# United States Court of Appeals for the Second Circuit



**APPENDIX** 

## Nos. 74–1584, 74–1636

In the

### **Huited States Court of Appeals**

For the Second Circuit

SCIENTIFIC HOLDING COMPANY, LTD, AN ILLINOIS CORPORATION,

Plaintiff-Appellant,

vs.

PLESSEY INCORPORATED, A DELAWARE CORPORATION,

Defendant-Appellee.

APPENDIX. Volume V (Pages 1670-1945)

> Francis J. McConnell, Richard P. Campbell, 135 South LaSalle Street, Chicago, Illinois 60603,

ROBERT M. BLUM, 230 Park Avenue, New York, New York 10017,

Attorneys for Plaintiff-Appellant, Scientific Holding Company, Ltd.



PAGINATION AS IN ORIGINAL COPY

#### TABLE OF CONTENTS

	PAGE
Docket Entries in the District Court	1-7
Complaint	7-44
Answer	45-95
Answer to Counterclaims	96-102
Judgment	103
Notice of Appeal	104
Bill of Costs	105-106
Plaintiff's Objection to Bill of Costs	107-109
Amended Bill of Costs	110-111
Notice of Cross-Appeal	112
Transcript of Proceedings	113
Opening Statements	114-171
Plaintiff's Witnesses:	
Edward Allan Kovar - Direct Examination  Cross Examination  Redirect Examination	172-202, 1311-1315 203-530, 738-835 836-851
Recross Examination	851
Raymond N. Carlen - Direct Examination	531-553
Cross Examination	554-616
Redirect Examination	617-618
Recross Examination	619-630

	PAGE
Julius Lewis - Direct Examination	631-647
Cross Examination	648-725
Redirect Examination	726-729
Harold D. Shapiro - Direct Examination ,	730-738
William H. Tucker - Direct Examination	852-919
Cross Examination	920-1039
Redirect Examination	1040-1041
Warren J. Sinsheimer - Direct Examination	1041-1123
Cross Examination	1123-1179
Redirect Examination	1180-1195
Donald Clarke - Direct Examination	1195-1283
Cross Examination	1283-1304
Redirect Examination	1304-1309
Recross Examination	1310
Colloquy In Chambers	1316-1331
Keith P. Jones - Direct Examination	1338-1367
Cross Examination	1368-1385
Redirect Examination	1386-1390
Recross Examination	1390

	PAGE
Defendant's Witnesses:	
Seth Dubin - Direct Examination	1390-1430
Cross Examination	1430-1436
Dale Osborn - Direct Examination	1501-1511
Cross Examination	1511-1514
Constantine Vangelakos - Direct Examination	1515-1527
Cross Examination	1527-1530
Redirect Examination	1530-1531
David Gretton - Direct Examination	1437-1500.
Cross Examination	1531-1598 1598-1625
Redirect Examination	1626-1639
Recross Examination	1639-1644
Andrew D. Ballantyne - Direct Examination	1645-1660
Cross Examination	1661-1669
Milton H. Albert - Direct Examination	1670-1709
Cross Examination	
	1710-1740
Redirect Examination  Peter D. Hewitt -	1740-1742
Direct Examination	1746-1756
Cross Examination	1756-1762

	PAGE
Edward Allan Kovar -	
Direct Examination	1763-1791
Colloquy In Chambers	1792-1902
Charge Of Court	1903-1940
Verdict Of Jury	1940-1945

1	op 1552
2	MILTON H. ALBERT, called as a witness
3	on behalf of the defendant, being first duly
4	sworn, testified as follows:
5	DIRECT EXAMINATION
6	BY MR. MALONEY:
7	Q Mr. Albert, would you state your full name and
8	address for the record, please?
9	A Milton H. Albert. 44 Posy Drive, Lakewood,
10	New Jersey.
11	Q Would you tell his Honor and the jury about your
12	educational and work background, please?
13	A I am a Certified Public Accountant of New York
14	and New Jersey. I have been certified for over 30 years.
15	For approximately 25 of those 30 years I practiced
16	public accounting as a principal, a member of an accounting
17	firm. For the balance of the time I was the financial vice-
18	president of Plessey, Inc.
19	Q When did you first become associated with Plessey,
20	Inc.?
21	A May 1, 1968.
22	Q How long were you employed by Plessey?
23	A Until December 31, 1971.
24	Q Do you have any present connection with any Plessey
25	company?

1	op Albert-direct 1553				
2	A No, I do not.				
3	Q Are you receiving any retirement benefits?				
4	A No, I am not.				
5	Q Do you own any stock in any Plessey company?				
6	A No, I do not.				
7	Q How are you presently employed, Mr. Albert?				
8	A I am practicing accounting in my own name for my				
9	own account.				
10	Q Did you play some role in the acquisition of				
11	ISL by Plessey, Inc.?				
12	A I did.				
13	. Q Would you explain to his Honor and to the jury				
14	how you became involved in that transaction?				
15	A Yes. I received a call from Warren Sinsheimer				
16	early in December, 1969, suggesting that I get in touch with				
17	International Scientific in Barbados because he had heard				
18	that the company was for sale and that the person I should				
19	talk to was Mr. Allan Kovar.				
20	I called Barbados and was informed there that				
21	Allan Kovar was in the States. I traced him to the New				
22	York Athletic Club where he was ready to leave and suggested				
23	to him that he was right around the corner from Mr.				

to him that he was right around the corner from Mr. Sinsheimer's office and if he would call Mr. Sinsheimer they could probably get together immediately at Mr.

24

1	ор	Albert-direct 1554			
2	Sinsheimer's office.				
3	Q	Do you recall when this occurred?			
4	A	I think it was early in December, either late			
5	November -	- I think it was early December, 1969.			
6	Ω	Do you recall whether Mr. Kovar met with Mr.			
7	Sinsheimer	?			
8	Α	He did.			
9	Q	Were you present at the meeting?			
10	΄ , λ	No, I was not.			
11	Q	What was the next connection that you had with			
12	the transa	ction?			
13	A	I went out to Barbados to meet a Mr. Osborn, who			
14	was a prod	uction man for Plessey, in order to make a review			
15		ilities of International Scientific in Barbados			
16		y opinion of it.			
17		THE COURT: When was that, sir?			
18		THE WITNESS: That was in December of 1969.			
19		THE COURT: How long after this meeting that you			
20	arranged?				
21		THE WITNESS: Very shortly thereafter.			
22		THE COURT: Very shortly?			
23		THE WITNESS: Very shortly thereafter, yes.			
24	Q	Was Mr. Kovar in Barbados at the time of your			
25	first visi				
	ZZZSC VZSZ	1672			

A No, he was not.

Q Who did you meet with while you were in Barbados?

A I met with the comptroller of International Scientific, Ltd., an Edward Hourihan.

Q What was the substance of your discussion with Mr. Hourihan?

A Mr. Hourihan had a budget that he had made up for the year 1970 that was rather complicated. I reviewed that budget.

When Mr. Kovar visited with Mr. Sinsheimer he left an October financial statement and I obtained from Mr. Hourihan the November financial statement and reviewed the method that they had used to compute the profit, just the method, I didn't go into the books, and the method they had used in preparing their budget.

I also looked at their audited reports for the year of 1967 and 1968 and I think I also took copies of those back with me.

op

Q Mr. Albert, I show you a copy of Plaintiff's
Exhibit 13 and I ask you if you can identify that document?

A That is the budget that was presented to me by Mr. Hourihan when I visited him in Barbados for the first time.

Q Did Mr. Hourihan explain to you how he prepared the budget?

A Yes, he did.

Q What did he tell you?

A Well, he has back-up sheets in here showing how he arrived at his various conclusions that he used in the budget and I reviewed those with him. His method of obtaining his sales and so forth and I reviewed that build-up with him.

Q Did you make any attempts to verify any of the information upon which he based his budget?

A No, I did not.

Q On what appears to be Schedule A-5 of Plaintiff's Exhibit 13 there is a 1970 sales forecast, dated 2 December, 1969, listing a number of customers in dollar amounts.

During your visit in December, 1969, did you make any attempt to verify from ISL's records whether or not ISL had orders from those customers in the amounts listed there?

A No, I did not.

1	op Albert-direct 1557
2	Q Did you make any attempt to examine the order
3	book and determine what orders they had?
4	A No, I did not.
5	Q Do you know how Mr. Hourihan had arrived at the
6	costs which he used in preparing his budget?
7	A No, I do not.
8	(Defendant's Exhibit A-1 marked for
9	identification.)
10	Q Mr. Albert, I show you Defendant's Exhibit A-1
11	for identification and I ask you if you can identify that
12	document?
13	A This is a balance sheet and a profit and loss
14	statement with supporting schedules, I believe, for the
15	months of September and October, 1969, for International
16	Scientific, Ltd.
17	Ω Is that one of the documents which you said you
18	received from Mr. Hourihan?
19	A Yes, it is.
20	MR. MALONEY: I offer it in evidence, your
21	Honor.
22	MR. McCONNELL: No objection.
23	THE COURT: All right, it will be received.
24	(Defendant's Exhibit A-1 received in
25	evidence.)
	1675

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

Q Mr. Albert, I have also shown you Defendant's
Exhibit M in evidence. Would you identify that document
for his Honor and the jury?

A It is a balance sheet, a profit and loss statement. The balance sheet and the profit and loss statement are for the month of November, 1969, with supporting schedules.

Q When for the first time did you see that document?

A When I went down to Barbados, on my trip to Barbados.

Q Did you make any attempt during your trip to audit or examine the books and records of ISL to determine whether or not that statement was accurate?

A No, I did not.

Q Referring to the profit and loss statement included in Defendant's Exhibit M, Mr. Albert, I believe it is on the second page of the document, what is the amount of loss which Mr. Hourihan had shown for the 11 months through November 30, 1969?

A \$169,000.

During the time of your first visit, did you have any discussion with Mr. Hourihan as to what the amount of the loss for December would be?

20,000 was the test equipment that would be written off.

24

25

I think 15,000 was the reserve for bad debts and

24

25

\$44,000.

1560

Would you tell us which page you are referring

1	op	Λlb	ert-dir	ect		,	563a
2	follow.						303 <u>a</u>
3		THE COURT:	Okay,	no objection	to that.	т.	think
4	we will	take a short r					CHILIK
5		(Recess.)					
6							
7							
8							
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							
21							
22							
23							
24							
25							

#### Albert-direct

#### BY MR. MALONEY:

mmh 1

Q Mr. Albert, I think you were going to explain to us how you arrived at the figure of \$600,000.

- A The total --
- Q Excuse me a minute so his Honor can see this.

A The total current liabilities as shown on the November 31, 1969, statement were \$502,000 in round figures. Deduct from that the \$57,000 in the redemption of debentures, which would leave a net balance of \$445,000.

There was a note payable to Data 100, which is shown as a long term liability and which we agree to pay off, and this is \$200,000.

In addition to that, we had to give the International Scientific people \$180,000 on closing, giving us a grand total of liabilities of \$825,000.

Half of the current assets of --

- Q Where are you now?
- A I am looking under current assets on the same balance sheet, which is \$554,346. Half of that in round figures is \$272,000.
  - Q What did you say half was?
- A \$277,000, I am sorry, leaving \$548,000 that would have to be paid out, assuming no further adjustments.

But we were looking at \$15,000 as a bad debt

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

looking for some collateral for the \$84,000 we agreed to

24

25

take the house out of the corporate assets and buy the house

#### Albert-direct

2 for \$84,000.

I then flew down to Barbados in order to properly set up the \$84,000. They had had some problems with the Canadian Imperial Bank in Barbados. It seemed that on a previous occasion they had gotten a loan and the Canadian Imperial Bank had a lien on the assets and had seized a part of the money that they had received as a loan. We didn't want this to happen because we were bringing the money down there for the sole purpose of keeping this plant in business until such time as we could close our contract for it.

So I flew down there and opened up a special account in the First National City Bank in Barbados that was exclusively a payroll account, limiting the use of the \$84,000 for payroll.

- Q Do you recall how long you were in Barbados on that trip?
  - A Approximately three days.
  - Q During that trip did you meet with Mr. Hourihan?
  - A Yes, I did.
- Q Did Mr. Hourihan give you any different or additional information, financial information, concerning the company, than he had given you on your earlier trip?
  - A No, he did not.

mmh4 Albert-direct

Q Do you recall the date on which the contract was signed?

A I think it was February 5th or 6th. I don't know the exact date.

Q As of the date the contract was signed had anyone give you any information to indicate that more than \$600,000 would have to be invested by Plessey?

A No.

Q During your second trip to Barbados in connection with the house did you spend any time during that trip examining the financial books and records of ISL?

A I was kept very busy trying to get a solicitor, get title cleared, open up the necessary bank accounts, and getting everything set up on the transfer of the house, and I had no time to even discuss the records, let alone look at them on that trip.

Q During this second trip did Mr. Hourihan mention any additional adjustments that would have to be made to the 1969 statement, other than the \$15,000 bad debts and the \$20,000 writeoff of test equipment?

A No, he did not.

Q Did Mr. Hourihan give youany additional financial statements during that trip?

A No, he did not.

	1
	2
	2
	3
	Ü
	4
	5
	6
	7
	8
	·
	9
	10
	11
	12
	13
	14
	1.4
	15
	16
	17
<b>b3</b>	18
	19
	13

2

3

5

6

7

8

20

22

23

24

25

mmh5 Albert-direct

Do you recall whether Mr. Kovar was present Q in Barbados during that trip?

He was.

Was there any discussion with Mr. Kovar during that trip as to whether or not more than \$600,000 would be required?

No, there was not.

Between the time of your first trip some time in December and your second trip in connection with the house, did you visit Barbados at any time between those two trips?

No, not that I remember.

Do you have any recollection of visiting Barbados at any time between the trip in early February or late January concerning the house and your trip to Barbados . r the closing?

A No, I do not.

Do you know when the closing took place, Mr. Albert?

March 2nd and 3rd, 1970. A

Do you have any recollection of any discussions with Mr. Sinsheimer concerning the closing before you left for Barbados?

I probably had some discussions, but none that A I remember specifically.

L	mmh6 Albert-direct
2	Q Prior to your leaving for Barbados did Mr.
3	Sinsheimer ask you to seek any amendments of the contract
1	at the closing?
•	A No, he did not.
	Q Do you recall any discussion with Mr. Dubin before
	leaving for Barbados of seeking additional amendments to

- A None at all, no.
- Do you recall any discussions with anyone at Q Plessey?
  - A No.

the contract?

- Do you recall when you arrived in Barbados?
- On Sunday, I think it was, March 1st.
- Do you recall what happened on March 1st in Q connection with the closing?

Nothing particular happened as far as I was concerned in connection with the closing. I think the attorneys were meeting and at night we had dinner at Allan Kovar's house, the attorneys and myself. But the dinner was completely social. The closing was not discussed.

Going to Monday, March 2nd, and Tuesday, March 3rd, would you tell his Honor and the jury what happened at the closing?

At the closing we discovered two things: one, that

1688

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

16

8

10

11

12

13

14

15

17 18

19

20

21 22

23

24

25

mmh7

#### Albert-di rect

the loss between November, 1969, and December, 1969, had increased by approximately -- I think it was over 200,000.

THE COURT: How did you find that out?

THE WITNESS: We were given financial statements.

THE COURT: By whom? Do you remember?

THE WITNESS: Mr. Hourihan.

Secondly, and I think this was later. -- we discovered that the loss for the months of January and February would be approximately 74,000.

At that point we called Mr. Sinsheimer in New York and he told us to forget the deal and come on home.

However, after some discussions we decided to suggest an amendment to the contract.

THE COURT: When you say "we decided" --

THE WITNESS: Dubin and myself.

THE COURT: Dubin and you.

THE WITNESS: Yes, to ask for amendments to the contract, and we did.

Q I show you Defendant's Exhibit AZ in evidence,
Mr. Albert, and I ask you if you can identify that document.

A This is the financial statement that was presented to us by Edward Hourihan at the closing.

Q Would you explain to his Honor and the jury how did you arrive at the decision that an additional \$200,000

1 | mmh8

#### Albert-direct

would have to be invested by Plessey?

A The loss was \$200,000, the loss in excess of the loss that they had shown at November 30th, and, actually, they had no source for the loss but to incur additional liabilities, which meant that we would need an additional \$200,000.

Also, using just the comparison -- I think it is the third page of the exhibit -- shows a balance sheet at December 31, 1969. In that balance sheet the current assets have dropped from 554,000 to \$487,000 --

MR. MALONEY: Excuse me. Is it all right if I put this on the board, your Honor?

THE COURT: Sure.

Q Taking your current liabilities, how was that changed on the balance sheet which Mr. Hourihan delivered at the closing?

A The current liabilities went from \$645,000. That includes the Data \$200,000 note, which he has now up among current liabilities. It has moved from \$645,000 to \$837,900.

- Q Which is an increase of what?
- A It is an increase of \$193,000.

Now, deduct from that the current portion of long term liabilities of \$80,000, because, again, I believe that that \$80,000 included the current portion of the debenture

mmh9

#### Albert-direct

bonds, leaves an increase of \$113,000.

Q In the current liabilities that Plessey was assuming?

A That is right. And to that should be added the \$26,000 mortgage that is shown on this statement as a long term liability, because that was a lease on machinery and equipment that we were to pay off, at least, it was part of it.

Add to that figure the decrease in the assets, in the current assets of \$67,000, and you have got your \$200,000 that was needed in addition to the \$600,000.

Q Going back for a moment, Mr. Albert, during your discussions with Mr. Kovar and Mr. Hourihan prior to the signing of the contract, had there also been discussions of the amount of money they expected to lose in the months of January and February?

- A During the period when the contract was discussed?
- Q Yes.
- A Yes, accumulated total of \$40,000.
- Q Now, at the closing did Mr. Hourihan advise you what the loss was for those two months?
  - A He did.
  - Q What did he tell you?
  - A \$74,000.

b4

#### Albert-direct

	Q	Did	he	break	that	down	in	any	way	or	did	he
just	give	you	a	total	figure	9?						

A No, he didn't have a breakdown; he gave us the total figure.

Q Had he prepared a written statement?

A At that point he didn't have a statement, no; it was off his work sheets I think that he got the figure.

Q At any time during the closing did Mr. Kovar or Mr. Lewis or Mr. Hourihan indicate that there were items in this \$74,000 loss which should not be included for the purposes of the calculation to be made under the contract?

A No, they did not.

Q Did anyone dispute that there would be a need for Plessey to invest an additional \$200,000?

A No, there was not.

Q Referring to Defendant's Exhibit AZ, had you seen a copy of that statement or a draft of that statement before you arrived in Barbados?

A I don't believe I did. I may have. But if I did it was probably the day I left or the day before I left.

Q I think I interrupted your testimony. You said you and Mr. Dubin had proposed some amendments and gone back to Mr. Sinsheimer. Now, I don't recall whether I asked you for the substance of that conversation with Mr. Sinsheimer.

100	
945	mmh11
	mmnii

#### Albert-direct

A Well, Mr. Sinsheimer said that if we could get the amendments we could close.

Q Do you have any recollection at any time during the closing of Mr. Dubin saying that one of the reasons plessey was asking for the amendments was because we had thought the closing would be in February and we were not closing until March?

A No.

Q During the closing do you have any recollection of anyone raising a question concerning Mr. Kovar's authority to sign the amendments?

A No.

Q Mr. Albert, during Mr. Kovar's testimony I asked him for his explanation of the increase in the \$200,000 loss shown on the November 30th statement to \$399,000 loss shown on Mr. Hourihan's statement. I ask you if you have had an opportunity to review Mr. Kovar's testimony concerning those changes?

A Yes, I did.

Q One of the items which Mr. Kovar mentioned was a writeoff of \$20,000 in test equipment. Do you have any recollection of that item being discussed or mentioned?

A I think it was, yes.

Q Is that the item which you referred to as one

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

A

2

1

3

5

6

8 9

10

11

12

13 14

15

16

17

18

19

20 21

22

23

24

25

Did anybody ever tell you that there would be two writeoffs of the test equipment, each for \$20,000?

of the two adjustments Mr. Hourihan had told you about?

That is right.

There was just supposed to be one writeoff of test equipment.

I believe Mr. Kovar mentioned the \$15,000 reserve tobad debts. Is that the second item which you discussed with Mr. Hourihan?

A Yes, it is.

Or was there one writeoff?

Mr. Kovar suggests that part of the difference was explained by a \$32,000 currency devaluation. Are you able to tell from examining Mr. Hourihan's statements whether or not that could have accounted for any part of the difference?

Note 13 on Mr. Hourihan's statement reads the loss on devaluation in the amount of \$31,671 has been written off to capital and accumulated deficit in the conversion of the balance sheet to U.S. dollars. In other words, it was not shown as a loss on the profit and loss statement; it was charged directly to the capital account, or the net worth account.

Which would be on what statement? Q

#### Albert-direct

A	It	woul	d be	on	the	balance	sheet,	not	on	the
profit	and 1	oss s	tate	men	t.					

Q Now, if it were also reflected anywhere on the profit and loss statement, in what category would it be reflected?

A On the profit and loss statement under Other Expenses. They have an item which is labeled Realized Loss on Devaluation. That item is zero on the profit and loss statement.

Q Mr. Kovar suggested that by December 31, 1969, ISL had in house \$150,000 worth of credit returns. Now, is it possible that could have accounted for any part of the increase in the loss on Mr. Hourihan's statement?

A No, it couldn't.

Q Will you explain to his Honor and the jury why that is so?

A Because when merchandise is returned, while it reduces sales, it also reduces cost of sales correspondingly. Usually, the net difference will only be the profit margin. In this case the company was operating at a substantial loss. There was no profit margin. So that the reduction in cost of sales should have equaled the reduction in sales and it should have no effect on the profit.

Q In comparing the November statement, Defendant's

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

Exhibit M, and Mr. Hourihan's, what happened to the figures for cost of sales?

A Cost of sales went from \$864,000 at November 30, 1969, to \$1,046,000 in December, 1969, an increase of approximately \$181,000.

Q Could that possibly be explained under any type of accounting principle based upon a return of goods having a value of \$150,000?

A No. The return of goods should have caused a decrease in the cost of sales. Mr. Maloney, it is as simple as this: if you buy a sweater at Macy's and you pay Macy's \$20 for it, when you return the sweater to Macy's, Macy's does not lose \$20. I think that is approximately the best way I can put it.

Q Now, at the closing was there also some further dispute concerning the place of payment of the \$180,000 down payment?

A Yes. Mr. Kovar made a request that the \$180,000 be paid in the United States.

Q Do you recall when that discussion arose with respect to the amendments?

A Yes, it was after the amendments had been agreed upon and were in the process of being typed, this question was raised by Mr. Kovar.

mmh15

#### Albert-direct

	Q	H	ad ye	ou released	the	money	for	Data	100	prior
to	the	time	the	amendments	wexe	agreed	l to	?		

A No, I did not. I released the money for Data 100 after the amendments were agreed to and were in the process of being typed.

Q The dispute concerning the place of payment of the \$180,000, did that arise before or after you had arranged to release the money to pay Data 100?

A It arose after we had arranged to release the money to Data 100?

Q Did you make any statement with respect to whether or not Data 100 would be paid while this other dispute was open?

A Well, I actually attempted to stop payment to
Data 100 because Mr. Kovar had taken the position that this
was something he was going to insist upon. However, by
the time I made that move, the money had already been cabled
out of Barbados to New York and I had no way of stopping it.

Q What did you understand to be the reason for the dispute as to where the \$180,000 would be paid?

A The reason for the dispute as to whether the \$180,000 would be paid, as explained to us, was that ISL wanted to try to avoid getting involved with the exchange laws of Barbados, the country of Barbados.

4 5

**b**5

Q.

Why was Plessey opposed to paying the money

2 3 4

6

8

7

9

10

12

13 14

15

16

17 18

19

20

21

23

24

25

A We were a new company coming into a strange country. We could get no assurances from any solicitor in Barbados that this payment would not be contrary to Barbados law, actually paying it out of the country, and we therefore did not want to start off in a new country by

Q At the time of the closing no one knew whether or not it would be proper? Is that correct?

A That is correct.

breaking the laws of that country.

Q During the closing did either Mr. Lewis or Mr. Kovar challenge Plessey's rights to request amendments to the contract?

A I don't recall them having challenged that right.

Q Mr. Albert, there has been some testimony about re-laying out the work benches and so on in the plant, and I believe the testimony is to the effect that that cost approximately \$20,000.

Would that be reflected on the profit and loss statement of the company?

A No, that cost would have been capitalized.

Q Would you explain to his Honor and the jury what that means?

mmh17	Albert-direct
A	It would end up as an asset account and would
be reflec	cted on the balance sheet; it would not be reflected
in the p	rofit and loss account.
Q	How about the purchase of test equipment?
A	That would also have been capitalized to become
a part of	an asset account, and not part of an expense account
	THE COURT: You are talking about accounting
theory?	You don't know what they did down there?
	THE WITNESS: I know what they did

THE COURT: You are talking not only as going accounting practice but that is what they did?

THE WITNESS: Yes, sir, I know it was capitalized.

Q Mr. Albert, did you participate in any way with Mr. Hourihan in preparing the year end statement or any draft of that statement?

A I did not.

Q Now, referring to Mr. Hourihan's statement, again Defendant's Exhibit AZ, notes 3 and 4, note 3 says, "The inventories of the company include 13,000,000 memory cores on which a value of \$6500 has been placed. The company has no immediate need for these cores."

And then note 4 (b):

"Work and materials in progress - (1) materials - as for raw materials, with the exception of 13,000,000

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

memory cores which have been valued at \$5,000, although their value is doubtful and the cost may not be recovered, the market price is unobtainable at this time."

Do you recall any discussion of these memory cores

- Well, at the closing or prior to the closing.
- Did Plessey have some plan for the memory cores which Mr. Hourihan indicated were obsolete on his statement?
  - We felt we could use them elsewhere.
- When for the first time did you learn there were only 1,300,000 memory cores, rather than 13,000,000?
  - It was late April or early in May.
- Did Mr. Hourihan indicate to you at any time at the time of the closing that the company did not have, in fact, the 13,000,000 memory cores?

(Defendant's Exhibit CE marked for identification.)

- Mr. Albert, I show you Defendant's Exhibit CE for identification and I ask you if you can identify that document.
- Yes, this was a letter that was given to me either by Edward Hourihan or Mr. Kovar. I don't recall who gave it to me originally. And it was prepared by Mr. Hourihan

1 mmh19 Albert-direct and it is marked to EAK, who is Mr. Kovar. 2 THE COURT: On the last page it says copy to Milton 3 Albert. Do you notice that? "Milton Albert - I await your 4 5 comments to submit to MA." 6 THE WITNESS: That is me. Do you recall when you received the memorandum, 0 8 Mr. Albert? 9 I think it was some time in April or the beginning 10 of May. 11 MR. MALONEY: I offer it in evidence. 12 MR. McCONNELL: I object. This falls in the 13 same category as Mr. Gretton's statement, Plaintiff's 14 Exhibit 57. 15 THE COURT: No, I don't see that. 16 Mr. Hourihan had been the accountant there when 17 you arrived. Is that correct? 18 THE WITNESS: That is correct. 19 THE COURT: He had been ISL's accountant? 20 THE WITNESS: Controller, yes. 21 MR. MALONEY: I believe Mr. Kovar also testified 22 he was the man who took charge of the entire company in Mr. 23 Kovan's absence. 24 THE COURT: Yes, I think I will receive this. 25 xx (Defendant's Exhibit CE received in evidence.)

1 mmh20

#### Albert-direct

MR. MALONEY: Your Honor, may I read portions

3

of it?

5

still in charge?

6

7

8

9

10

11

b6 12

13

14 15

16

17

18

19

20

21

23

24

25

THE COURT: Do you recall whether Mr. Kovar was

THE WITNESS: Yes, he was.

THE COURT: Thank you. Go ahead.

Q On page 1, the first paragraph, Mr. Hourihan writes, "Although I am not proposing that I am incompetent severe doubts may be raised in this memo."

And then he goes on to recount what has happened in the company since he joined on May 1, 1968.

Then going over to page 5:

"By the end of July - and from context he means
July 1, 1969 - the potential investors had begun to arrive.

They continued to arrive up to the actual sale on March 2,

1970.

"As the potential investors arrived my responsibilities again increased as you spent a good deal of time
megotiating in the USA and a new operations manager had
taken over who had more drive and promise but no materials.
The situation again appeared to be on the upswing with our
July track record and the prospect of sufficient money to
get the volume of outstanding transactions wiped out. A
vacation was denied.

1

3

5

7

9

10

11 12

13

14

16

15

17

18

19

20

21 22

23

24

25

After the false start with Data 100 the pressure for information was insatiable.

The budget became due. The input was not in a reasonable form. Extracting information was like pulling teeth. In certain cases the information was so bad that I personally had to give operations the names of people that they appeared to be unaware of when they gave me their personnel requirements.

"November came as did Mr. Fenty. Due to my previous commitments he was pushed into a garbage heap with the minimum of guidance. That he performed at all was amazing."

Skipping down to the bottom of page 6:

"The first part of January was spent sorting out messes caused by the bad inventory count of 12/19. And the second count of January 5th and 6th. Cutoff was difficult because:

- "1 New organization WIP which means work in progress - all moved.
- "2 Goods received before count not properly segregated.
- "3 Complete reorganization of people necessitating changes in payroll distribution.
  - "4 The dumping of the production control clerks

on accounting.

2

3

9

10

11 12

13

14 15

16

17

18

19

20

21 22

23

24

25

"5 - The sudden promotion of the cost clerk to floor manager, etc., etc."

Skipping down to the bottom of the page: "Intersil and STC were requested to produce audited statements for February 15th to tie in their payable with ours. They arrived after the compilation of the statements. Possible \$40,000 error."

At the top of page 8:

"We neglected to count engineering stores. As it turns out - of \$26,000 a good portion is tied up in YB 1,2 and 3, another possible writeoff - subsequent to the \$20,000 already written off from the assets. My fault again. I should have been responsible enough to know that the attached estimate was no estimate at all and looked for the balance which would have turned up in engineering materials.

"To top the whole mess, I put my reputation at stake signing an attestation which was part of the contract of sale to Plessey."

Do you recall how you reacted when you received this memorandum, Mr. Albert, in April or May?

Rather shocked. I sat down and discussed the memorandum with Allan Kovar, because he was really the man responsible. He was president of International Scientific

mmh23

## Albert-direct

(1970) Limited at the time. And we decided between he and myself that Edward Hourihan had been under a tremendous amount of pressure in the way he had to operate and that he should be given a chance to continue in the job now that plessey was there; and now that all of the other things were out of the way, maybe he could get ont. He was a chartered accountant, I believe, of Canada, which is comparable to a Certified Public Accountant in the United States. So the man had the background for this type of thing.

.

# Albert-direct

Q Was Mr. Hourihan given a chance of title?

A That was subsequently.

gth 1

Q Subsequent to the memorandum?

A Subsequent to the memorandum.

Q How did that come about?

A We were having a great deal of difficulty with the entire salary structure at Plessey -- at International Scientific in Barbados. The setup that they had with the employees was to pay approximately one-quarter of their salary in Barbados and the balance of their salary was paid into bank accounts in Nassau.

We were informed by our solicitor in Barbados that this was contrary to Barbadian law, especially in view of the fact that most of the employees were not getting enough in a Barbadian salary to live on the salary in Barbados.

In the second place, a number of employees had private deals, so to speak. I don't want to put a derogatory meaning to the word "private deals" there, but they had private arrangements, I think is the better term, that they had made with Allan Kovar at the time that they came to work. Some of them had cars furnished, some of them had their rent paid, some of them had arrangements whereby periodically their expenses would be paid when they went back to the

gwh2

## Albert-direct

States. It was all over the lot. And so --

THE COURT: What employees are you referring to here?

THE WITNESS: I am referring to the engineers and the executives primarily. The employees --

- Q The British and the United States citizens?
- A The British and the United States employees.
- Q What did Plessey do to attempt to resolve that situation?

being paid in Barbados, lifting that substantially, also entered into an agreement with the employees that the money being paid to them out of Plessey Electronics into United States bank accounts would not be transferred back to Barbados for their own use. We eliminated the special arrangement with the employees and in doing this made a general overhaul of the compensation structure, which gave some of the employees -- which gave all of the employees, I believe, more of a dollar payroll and more of a take home pay.

I think it is necessary to state here that if my memory serves me right, the income tax in Barbados on an income of \$3,000 in U.S. salary is 75 per cent, and when you increase the employees' pay in Barbados you had to

gwh3 Albert-direct

substantially increase his gross pay in order to give him something to compensate for it.

- Q Did Mr. Hourihan receive any increase in compensation beyond what was done for the other employees?
  - A All of the employees did.
- Q Did there come a time when you terminated Mr. Hourihan?
  - A Yes, there did.
  - Q And would you tell us how that came about?
- A The fiscal year of the Plessey Company ends on June 30th. Mr. Hourihan called me and said that from the time he started to work for International Scientific, Limited he had never had a vacation. He felt that when Plessey had taken over the company it had also taken over the vacation responsibility, and I agreed with him, and we agreed that he would take a three-week vacation.

The vacation he wanted to take was to start

at the end of July, and I told him that that was impossible

because of the fact that Plessey closes its books at June 30th

and normally needs its certified report by August 15th.

Mr. Hourihan said he would not leave until such time as the certified report was already finished and in the hands of the auditors ready to be put into final shape.

Based on that, he left on July 30th, the last week in July--

1

5 6

7

9

10

11

12

14

15

16

17

18

19

20

21

22

23

24 25

13 became moot.

I don't know the exact day.

After he left we found that he had left the auditors, who were Price Waterhouse, out on a complete limb and, in act, I had to fly down to Barbados to assist them to get the information that they needed to close and the closing was held up until late in August.

It was at this point I decided that I was going to discharge Mr. Hourihan. However, at the same time, the Barbados Government withdrew his work permit. I haven't the slightest idea why they did it, but they did withdraw his work permit at the same time, and so the question really

I did notify him that he was fired, but I couldn't have kept him on if I wanted to.

MR. MALONEY: I have no further questions.

THE COURT: We will take our luncheon recess now. Let us meet at a quarter to 2, ladies and gentlemen.

(Luncheon recess)

23

24

25

Albert-cross

## AFTERNOON SESSION

1:45 P.M.

MILTON H. ALBERT, resumed.

(Jury present.)

THE COURT: Good afternoon, ladies and gentlemen. All right, proceed.

CROSS EXAMINATION

hph 1

BY MR. MCCONNELL:

- Mr. Albert, I show you what is in evidence as Plaintiff's Exhibit 10 and ask you if you have seen a copy of that before.
  - A I believe I have, yes.
  - When did you first see that? Q
  - I don't remember.
- Do you recall that that is the report prepared by Mr. Osborne, the Plessey production man?
  - A Yes, it it.
- And he is the same gentleman that was down there when you were down there in Barbados, in December of 1969?
  - That is correct.
  - Does that show your name on the first page?
- On the first page, no. On the last page, on the A distribution list.
  - Look at the top right-hand corner on the first

	1592
1	hph2 Albert-cross
2	page.
3	A Yes, it does, I'm sorry.
4	Q And it also shows you on the distribution?
5	A Yes.
6	Q Do you recall how soon after that trip you re-
7	ceived a copy of this report?
8	A I don't remember, but it probably was soon after
9	that trip.
10	Q Did you talk with Mr. Osborne when you were down
11	there?
12	A Yes, I did.
13	Q Did you touch base with one another on your
14	respective investigations?
15	A Yes, we did.
16	Q Mr. Osborne states, "The envisioned and current
17	output orders for the year 1970 are in the hands of Mr.
18	Milton H. Albert, a financial controller from Plesssey
19	Incorporated"
20	THE COURT: What are you reading from?
21	MR. McCONNELL: Page 2.
22	Q Starting again, "The envisioned and current output
23	orders for the year 1970 are in the hands of Mr. Milton H.
24	Albert, a financial controller from Plessey Incorporated,
25	who after researching the financial aspects of the company
	and the company

reached the same conclusion. Any negotiations that might take place would be carried out with the position that Scientific Instruments Limited is a viable proposition."

Do you know what Mr. Osborne was referring to?

A I believe he was referring to the only thing he could be referring to, the production end of it. Because financially, it certainly was not a viable operation.

Q Do you think he might be referring to the 1970 budget which you said you reviewed?

A No, I don't believe he was.

a little confused by the way you started this off. This quotation starts that this gentleman says, Mr. Osborne says, "With a very firm hand controlling expenditure and reducing excesses, together with complete shop floor control, the deficit which was calculated to be about \$70,000 for the month of December, could be at break-even point by the end of March, that is, approximately \$135,000 output per month, required by the end of April. The envisioned and current output orders for the year 1970 are in the hands of Mr. Milton H. Albert, a financial controller from Plessey Incorporated who, after researching the financial aspects of the company, reached the same conclusion." I suppose that was the conclusion he said you

Albert-cross

reached.

hph4

THE WITNESS: That's correct.

THE COURT: I didn't get that before. You reached a conclusion the deficit which is calculated about \$70,000 for the month of December could be atbreak-even point by the end of March, that is, approximately \$135,000 output per month required by the end of April?

THE WITNESS: There are other ifs in there. That is, if costs were controlled, if expenditures were controlled, and if we got the shipment of \$135,000 out.

Q But that was the envisioned break-even point, 135,000, is that right?

A Based on the figures we had, but those were figures that were submitted. We didn't audit those figures in any manner.

Q Does Mr. Osborne's report refresh your recollection that the loss for December was anticipated at \$70,000 rather than 25, as you testified?

A No. I testified that Mr. Hourihan gave me a figure of \$25,000 to \$27,000. I wasn't testifying to the figure in Mr. Osborne's report.

Q In fact, Mr. Osborne's report, based on whatever investigation he had made or you had made indicates that the loss for December would be \$70,000; is that right?

1	hph5 Albert-cross 1595
2	A I don't know. I would have to
3	THE COURT: Look at that statement of Osborne's.
4	He does indicate that, doesn't he?
5	THE WITNESS: He does indicate that, yes.
6	Q Do you know where Osborne got his information?
7	A No, I do not.
8	Q When you were down there, did you ask to look
9	at the accounts payable?
10	A No, I did not.
11	Q Did you ask to look at the accounts receivable?
12	A No, I did not.
13	Q You just took this financial statement for
14	November, and based your analysis on that; is that it?
15	A That is correct.
16	Q Plus the 1970 budget?
17	A That is correct.
18	Q And you didn't go behind those figures?
19	A No, we did not.
20	Q And you were not interested in going behind those
21	figures; is that it?
22	A We didn't have the time to go behind those figures.
23	Q What was the purpose of your trip down there?
24	Why did Mr. Sinsheimer send you down there?
25	A To take a look at the facility, primarily.
	1714

	1	hph6	Albert-cross		
	2	Ω	You were the chief financial man, were you not?		
	3	A	That is right.		
	4		THE COURT: Don't argue with the witness. Leave		
	5	it at tha	t.		
	6	Q	You knew, did you not, Mr. Albert, that based on		
	7	your init	ial investigation that this company was in dire		
	8	financial	financial shape?		
	9	A	I did.		
	10	Q	And you realized that it would need an immediate		
	11	infusion	of \$600,000 capital?		
	12	A	If we took over, yes.		
	13	Q	I show you what is in evidence as Plaintiff's		
	14	Exhibit 1	09, which is Mr. Sinsheimer's report to the Plessey		
	15	board und	er date of January 7, 1970, and ask you if you		
•	16	helped Mr	. Sinsheimer in the preparation of that report.		
ь	2 17	A	No, I did not.		
	18	Q	Did you report to Mr. Sinsheimer on your findings		
	19	after you	came back from Barbados?		
	20	A	Yes, I did.		
	21	Q	Mr. Sinsheimer in his report to the board states:		
	22	"Briefly,	this company is in dire financial straits, it		
	23	having at	this time either no asset value or a negative		
	24	net worth	. It appears that this company needs an immediate		
	25		of \$600,000 to continue in business." Do you		
			1715		

1

3

5 6

7

9

10 11

12

13

14

15

16

17

18

19

20

22

21

23

24

25

know where Mr. Sinsheimer got his information?

From me.

But I thought your testimony this morning was that based on the November financial, the company had a positive net worth of a hundred thousand dollars?

But it still was insolvent. Its liabilities were still far in excess of its current assets. They couldn't have paid their bills with machinery.

0 But nevertheless--

THE COURT: Please don't argue with the witness, Mr. McConnell. You keep doing this. I don't think it helps any.

I show you what is in evidence as Plaintiff's Exhibit 80, which is Mr. Crocker's report under date of January 7, 1970, in which he states --

THE COURT: Will you show it to him. You said you will show it to him.

MR. McCONNELL: I'm sorry.

- Why don't you take a look at that first. 0 (Han ded)
- In which he states: "This is to confirm our telephone conversation in which I state that having analyzed the order book of the above company which stands at approximately 1.25 million pounds, I find it entirely

hph8

### Albert-cross

satisfactory." And then, skipping, "If one compares this with our own experience, we are able to profitably sell at \$1.50 per hour. Therefore, it can be seen that the whole of the order book should be profitable providing their efficiencies are reasonable which John Osborne considers to be reasonably achievable." Do you know where Mr. Crocker got his information?

A That's the first time I have seen this memorandum.

I have never seen it before.

THE COURT: The answer is you don't know where he got it?

THE WITNESS: I certainly don't know where he got the information.

- Q I take it you didn't report to Crocker on that subject?
  - A No, I didn't report to Crocker on any subject.
- Q I show you what is in evidence as Plaintiff's

  Exhibit 111, which is the report on the proposed acquisition

  of ISL Sea Well, Barbados, by Plessey Incorporated. I ask

  you if you have ever seen that before?
  - A I believe I have, yes.
  - Q Does that show you on the distribution?
  - A Yes, it does.
  - Q When did you first see that?

	1599
1	hph9 Albert-cross
2	A I don't believe I saw this until after the closing
3	Q Are you sure of that?
4	A I'm pretty sure of it.
5	Q What makes you pretty sure of that?
6	A I don't know, It seems to me that I remember
7	having seen this. In fact, I remember having seen it out
8	in Farmingdale, Long Island, and my recollection seems to
9	be that it was after the closing.
10	Q Does that report have attached to it a statement
11	of profit and loss for ISL for the year 1969?
12	A Is there an index here?
13	THE COURT: If there is, tell him, to save some
14	time.
15	A It's in the index, but I don't seem to find the
16	statement.
17	Yes, it did.
18	
19	
20	
21	
22	
23	
24	
95	

	1	mpl	Albert-cross 1600
T2	2	Q	Does that show that the loss for 1969 was
	8	\$395,000?	
	4	А	Yes, it does.
	5	0	Is that approximately the same figure as shown
	6	on Hourih	an's warranted statement?
	7	А	Yes, approximately.
	8	Ω	Hourihan's warranted statement shows \$395,000?
	9	A	Yes.
	10	Ω	Do you know who prepared that report?
	11	А	No, I don't.
	12	Q	I show you what is in evidence as Plaintiff's
	13	Exhibit 1	.10. I ask you if you have ever seen that before?
	14	λ	No, I have never seen this before.
	15		MR. McCONNELL: Those are the minutes of
	16	February	27 of the English Plessey board, your Honor.
	17		THE COURT: I know. I have got it. He said
	18	he never	saw it before.
	19	Ω	Who is Mr. Frey?
	20	λ	Mr. Frey was a member of theboard of the Plessey
	21	Company a	and the chief financial officer.
	22	Q	Would he have been your superior?
	23	Α	No, I reported to Warren Sinsheimer.
	24	Q	. But for all the Flessey companies Mr. Frey was
	25	the chief	f financial person?
			1719

A That is correct.

4 5

1

2

3

6 7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Do you know where he got his information that the prospects for Barbadoswere better than originally envisaged, but that it now appearednecessary that working capital would have to be immediately provided in the likely region of \$800,000?

> A No, I wouldn't know where he got his information.

0 Do you recall that the contract provided that Plessey would put in the business at least \$600,000?

> A Yes, sir.

And as to that \$600,000 there was to be no charge to ISL?

That is correct.

Is it your testimony that part of that \$600,000 O was to be the \$180,000 down payment?

Yes, sir.

Well, I show you what is in evidence as Plaintiff's Exhibit 3, which is the February 4 agreement, and direct your attention to paragraph 5-A and ask you where inthe agreement it indicates that the \$103,000 down payment was to be paid out of this \$600,000?

I don't believe that it ever spelled it out exactly. I believe when I stated we had put \$600,000 in the business we mean \$600,000, not \$730,000. There is

mp3 Albert-cross

nothing in the contract.

Q So you would count as part --

THE COURT: We went all through this paragraph.

That is what you had on the board there?

THE WITNESS: Yes.

So if we subtracted that \$180,000 from your calculation as to what was necessary as of March 2 when you got, according to your testimony, the final figures for the year 1969, only the \$60,000 would be required? Isn't that right?

A That is true.

Q Well, did that \$180,000 down payment go to the business?

A It went to pay for the assets of the business, the net assets. Ithappens there were none, but at the time we drew the contract we thought there would be some.

Q But the \$180,000,didn't that go to the ISL shareholders?

A Yes, but it was in payment of the assets of the business.

Q Now, as I understand your testimony, either late in January or early in February you went to Barbados again to arrange for the purchase of the villa or the house?

A That is correct.

1	mp4	Albert-cross	1603	
2	Q	And the purchase price was \$84,000?	1003	
3	A	That is the price that we agreed upon, y		
4	Q	But there was a mortgage on the house?	es.	
5	λ	I believe there was a mortgage of twent	vor twenty.	
6	four thous	and dollars, somewhere in that vicinity.		
7	Q	Is it your testimony that the next of t		
8	gage, the	proceeds of that transaction were just s		
9		's payroll until closing?	ullicient	
10	A	That was the purpose of the arrangement		
11	Q			
12	Q The reason for doing that is that you didn't want this business to go under before you closed?			
13	A	That is correct.		
14	0	You must have known then, at least as on		
15		say, late January or early February, the		
16		as out of funds?	at the	
17		I did know, yes.		
18	Q			
19	raw materia	So if it didn't have any funds it couldn't	n't buy	
20		THE COURT: The witness is a financial m		
21	he tells us	why he bought the house.	nan and	
22				
23	February?	It would be reasonable then to expect a	loss in	
24		THE COURT: Please.		
25		Does that follow?		
		1722		

mp5 Albert-cross

THE WITNESS: Not necessarily.

THE COURT: I wouldn't think so.

- Q I believe you testified that the loss for January and February was approximately \$74,000?
  - A That is correct.

Q I show you what is in evidence as Defendant's Exhibit R, which is the February statement, and then it also shows year-to-date results, so from it we can calculate what happened in January, and ask you if included --

THE COURT: Would you show him the statement and he can focus on it.

Q My question, Mr. Albert, is whether the loss figure includes \$19,000 approximately of legal and audit expense and sixteen or seventeen thousand of bank interest expense?

- A Yes, it does.
- Now, when Mr. Hourihan told you that there was going to be or the books showed this loss for the two months. January and February, did you ask to see any of the supporting data as to the composition of that loss?

A No, I did not. He did not have supporting data. He was just preparing the figures.

- Q I take it he had the raw data?
- A He had the raw data, but I didn't go into the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1	mp	Albert-cross	1605
2	raw data.		
3	Ω	Did you ask to go into the raw data?	
4	А	No, I did not.	
5	Q	Do you recall that the contract of purp	ose called
6	for ISL to	furnish on signing a balance sheet for	the year
7	1969 and a	statement of profit and loss for the ye	ar 1969
8	warranted h	by Mr. Hourihan to the best of ISL's kno	wledge?
9		THE COURT: Warranted by Hourihan?	
10		MR. McCONNELL: Yes.	
11	A	I believe it did, yes, sir.	
12	Q	Well, was that balance sheet and statem	ent of
13	profit and	loss for the year 1969 furnished at the	time of
14	the signing	g of the agreement by Plessey?	
15	A	You mean in February?	
16	Ω	Yes.	
17	А	No, it was not.	
18	Q	So they signed the agreement without the	e state-
19	ments called for therein?		
20	А	That is correct. I don't know whether	er that
21	paragraph	calls for it at the time of the drawing	of the
22	contract o	r at the time of the closing. I didn't	read that
23	far.		
24	Q	Okay. Well, it says ISL has delivered	ed to
25	Plessey.	Does that refresh your recollection that	at it
		1724	

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

l m

3

1

2

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

it. Everybody here talked about negotiating.

Q After negotiating back and forth, did ISL agree to be charged with the cost of this additional \$200,000 at 10 per cent?

A Yes, they did.

Q And wasn't it after that had been agreed to that either you or Mr. Dubin -- I forget which -- said that in addition to that you wanted to shorten the management period by 30 days?

A No, I think the sequence was we had asked for both amendments at the same time; we did negotiate them separately, but we asked for them at the same time. It was a package.

Q You first secured agreement to ISL paying the additional \$20,000?

A Yes.

Q Then you negotiated on the other one?

A That is correct.

Q I believe you testified that the recognition of returns by ISL should not affect the profit and loss?

A That is correct.

Q Either for the year or for December?

THE COURT: Wait a minute. You better ask him the question. He said that the increase in the returns

1	mp Albert-cross 1608
2	would not change the profit and loss statement.
3	That is what he is asking you.
4	THE WITNESS: That is correct.
5	Ω But it would affect the sales?
6	A It would affect the sales and the cost of sales.
. 7	Q I am going to get to the cost of sales. Let's
8	take the sales first.
9	A It would reduce the sales.
10	Q That would likely account for the fact
11	THE COURT: Please don't make all these general-
12	izations. You better ask the witness. He is an account-
13	ant; you are not. You better ask him would it.
14	Q The business showed 1,080,000 of sales as of
15	November 30? Do you recall that?
16	A Yes.
17	Q And that was the same figure for year-end?
18	A \$2000 more at year-end.
19	Q Well, assuming ISL had 102,000 of sales, new
20	sales in December, but 100,000 of returns, their net sales
21	would only be 2000?
22	A That is correct.
23	Ω Do you know whether prior to December ISL had
24	recognized returns?
25	A Frankly, the first time I had heard about the
	1727

\$150,000 in returns in very recent, so I wouldn't know whether they recognized returns up until then or not.

- Q You don't know what their practice was?
- A I don't know what their practice was, no.
- Q Now, I believe you also testified that the returns would affect cost of sales?
  - A That is correct.
- Q Do you know whether Hourihan took the returns into account in cost of sales, or are you testifying that as an accounting matter they should be taken into account in cost of sales?

A As an accounting matter they would be taken into as against cost of sales.

- Q Do you know what Hourihan did?
- A I do not know what Hourihan did.
- Q So you do not know whether there was a corresponding reduction in cost of sales?

A I think I do, because actually if there were no corresponding reduction in the cost of sales at December 31, his inventory would have been overstated by approximately \$150,000. This overstatement would show up in the January and February financial statements when he prepared those statements. And, of course, it did not show up because the only thing that could have happened if he didn't reduce

cost of sales for the returns would be that he had this merchandise in inventory and had it recorded nowhere, so their shipments of this inventory would result in the profit of \$150,000, and no place is there a reduction of this. So I am pretty sure, I would say that I am positive that as a matter of record he had to record them as a reduction in cost of goods sold.

Q That would certainly be true if these returnes came back into inventory and the customer were given credit, such as your Macy's example?

A But you are saying the reason for the reduction of sales is because the customer has been given credit.

Q No, I am not saying that. Do you know whether or not on these returns the customer was given credit?

A If the customer wasn't given credit then the example that you gave me was wrong. If you had \$102,000 in sales and \$100,000 was returned and not credited to the customer, you would still have \$102,000 in sales. So the very example that you gave shows an anticipated credit.

Q I don't think so, Mr. Albert, but if those -THE COURT: Well, anyway, he thinks so. It is
what he says. Why argue about it?

Q Wouldn't it be true as to those returns that those returns had already been taken into account in sales in an

period or month?

1

2

3

5

7

8

9

10

11

12

13

14

15 16

17

18

19

20

21

22 23

24

25

Well, it wouldn't have affected December, and December was the month that had no sales.

Well, they would have affected it if Hourihan recognized them as a reduction in sales and made no corresponding --

I am sorry. I can't follow you. This is a double-entry system and requires a debit and a credit. You cannot make an entry on one side without making an entry on the other, because if you do you would knock your books completely out of kilter. So perhaps Mr. Hourihan , unless Mr. Hourihan was dishonest, and the only thing he would have done this -- and I see no other reason for it -the only thing which would have reduced the sales figures at December 31 as it was reduced would be because of a credit to the account, a debit to the sales account and a credit to the customer's account. It is the only thing that could have happened.

Do you know whether these astomers were given credit or whether the goods were simply turned around and shipped back?

If they were not given credit then the sales would not have been reduced.

THE COURT: Do you know whether the shipments

1

3

4

5

7

8

٠

10

11

13

14

15 16

17

18

19

20

22

23

24

25

were just taken back and just shipped out again? Do you have any knowledge of that?

THE WITNESS: No.

- Q I show you what is identified as Plaintiff's
  Exhibit 119. I ask you if you can identify that document?
  - A No, I cannot.
  - Q Isn't that a report prepared by you?
  - A No, it was not prepared by me.

MR. MALONEY: Could I see what the exhibit is?

THE COURT: Yes, he will show it to you.

Q I show you Plaintiff's Exhibit 118. I ask you if you can identify that?

A Those are some notes that I made when I went down to Barbados in December.

MR. McCONNELL: I offer 118 in evidence.

(Plaintiff's Exhibit 118 received in evidence.)

- Q I show you what has been identified as Plaintiff's
  Exhibit 43 and ask you if you can state what that is?
- A Yes, I prepared it. It is a cost estimate sheet.
  - Q When did you prepare that?
- A No, wait a minute. No, this is a budget objective. This is not a cost estimate sheet.

1	mp Albert-cross 1613
2	THE COURT: But you prepared it?
3	THE WITNESS: I prepared it, yes.
4	
	Q And when?
5	A This was probably prepared in my trip in December,
6	I would guess.
7	Q Doesn't that say it is based on Mr. Crocker's
8	report?
9	A Yes, it does.
10	Ω Would it refresh your recollection if I suggested
11	that that was prepared by you after you went down to Barbado
12	after the takeover in June?
13	A No, it was not.
14	THE COURT: What is that exhibit number?
15	MR. McCONNELL: 43.
16	MR. MALONEY: There is a sheet attached, date
17	of issue, 18.3.70. I don't know whether the second sheet
18	was prepared at the time of the first sheet.
19	THE WITNESS: I don't have a sheet attached
20	to this one.
21	Q Does that refresh your recollection when you
22	might have prepared that budget?

might have prepared that budget?

23

24

25

Well, the attachment was prepared on March 13, so that would have been after the closing. It would have been right after the closing.

1		
	1	
	2	
	3	
	0	
	4	
	5	
	6	
	7	
	8	
	0	
	9	
	10	
	10	
	11	
XX	•	
	12	
	14	
COLUMN TO A THE TENTE OF		
	13	
	10	
	14	
	15	
	3141.00	
	16	
	10	
	17	
	**	
	18	
	19	
	20	
	20	
	21	
HEATTEN STATE OF THE STATE OF T		
STATE OF THE STATE		
TO BE TO SERVICE OF THE PARTY O		
	00	
	44	
	22 23	
	23	
274 S 100 (100 S 100 S 1	2	

\_

mp

# Albert-cross

1614

Q The question is simply whether the attachment refreshes your recollection as to when you prepared 43?

A If the attachment was prepared in March, then the sheet attached to it was prepared in March.

THE COURT: You don't know that?

THE WITNESS: I don't know that as a fact.

MR. McCONNELL: Could we have the attachment

marked, since the witness has referred to it?

THE COURT: We will have it marked.

(Plaintiff's Exhibit 43-A marked for

identification.)

## hph 1 Albert-cross

MR. McConnell: I offer 43 and 44 in evidence.

MR. MALONEY: Has the witness identified 43A yet?

THE WITNESS: It was prepared by me.

MR. MALONEY: No objection.

(Plaintiff's Exhibit 43 and 43A received in evidence.)

Q As of the date that you prepared this -- what do you call that again?

A Budget objectives. It's noted on the top. It's a comparison of -- let me just see it again for a minute, please. It's the comparison of the 1970 budget, prepared in Barbados with a budget prepared by the Memories Division in England. It's the 1970 Barbados budget as against the 1970-71 budget prepared in England. They're for two different time periods, and it's done in, primarily, in pounds, although shown in both dollars and pounds here, budget '70-'71 in pounds. Here it is here (indicating). This would be the Barbados budget in pounds and this Norman Crocker's report in pounds and this is the conversion to dollars.

Q Converting on the Norman Crocker budget for the period 1970-'71, what were you projecting in total sales and what were you projecting in net profits?

A I wasn't projecting anything. I was taking a budget 1734

17

18

19

20

21

22

23

24

25

**b**2

# hph2 Albert-cross

prepared by somebody else and somebody else had projected.

THE COURT: He is not tying you down that you had projected anything, but on the basis of your analysis, what did the projection come out as a result of the work of the other people?

THE WITNESS: With a profit of \$610,000.

- Q On sales of what?
- A 3,000,240.
- Q Did it later turn out that on Hourihan's statement there was included 54,000, approximately, of payables, that proved to be non-existent?
  - A 54,000, I don't know anything about that.
  - Q You never heard of that?
- A No. It may have been discovered at some other time, but I didn't know about it.
- I show you what is in evidence as Defendant's Exhibit BG, which is the comparison by Price Waterhouse of the differences between Hourihan's warranted statements and their audited statement, and direct your attention to Schedule 6, and ask you if that refreshes your recollection on that subject.

THE COURT: Did you see this?

THE WITNESS: Yes, I did.

THE COURT: You saw that?

1735

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

#### Albert-cross

2

2

3

4

5

6

7

8

9

11

12

13

14

15

16

17

18

19

20

21 22

23

24

25

Q Nobody is asking you to do that. I'm --

me to comment on its financial effect, I think that

THE WITNESS: Yes, I did.

THE COURT: Take a look at it. Is it page 6 or Schedule 6?

MR. McCONNELL: Schedule 6.

A Now I remember it. I remember it now. I don't know what they were, but I do remember that when we finally got all through with it, there was an over-statement of liabilities.

Q So that the inclusion of those non-existent payables would have increased the deficit net worth of the company as shown on Hourihan's statement?

- A Yes, sir.
- Q And conversely --
- A The assets --
- Q -- taking them out, would reduce the negative net worth?

The assets omitted would more than offset it.

I mean, Mr. McConnell, I just feel when you take a statement

and take one statement, completely out of context, and ask

actually you are getting me to testify to something that

THE COURT: Don't do that.

I don't believe is stating the whole story.

		ı	ı
1		ı	ı
		Ì	l
		ı	ı
		۱	
2		I	ı
		I	ı
		ı	ı
		I	ı
3		I	ı
·		I	ı
		ı	ı
		I	ı
4		I	l
•		I	ı
		I	ı
		I	l
5		I	ı
		I	ı
		II	ı
		II	ı
6		II	ı
		I	ı
		I	ı
		I	ı
7		I	۱
		۱	۱
		۱	۱
		۱	۱
8		اا	ı
		I	ı
		I	ı
9		I	ı
9		I	ı
		I	ı
		I	ı
		I	ı
10		II	ı
		II	l
		II	ı
		I	ı
11		II	ı
••		I	ı
		II	ı
		I	ı
12		I	l
		I	l
		li	ŀ
		ľ	ı
13		II	
		H	l
		H	
		II	
14		II	
		II	
		N	
		I	
15		I	
		II	
	188	I	
10		II	
16		II	
		I	
		II	
17		II	
		I	
		II	
		II	
18		ıI	
10		II	
	100	II	
		I	
19		۱	
10		ı	
		II	
	25.11	II	
20		I	
		I	
		ı	
		II	
21		۱	
		I	
		I	
-		I	
22	1577	I	
		ı	
		I	

24

25

When you take a \$54,000 item out of context, and say doesn't that reduce the deficit net worth, the answer is yes. But, I think in the same context, in order to get a proper answer to that question, you have also got to take into consideration the assets which are reflected in the same statement, that were incorrectly recorded, that increases the deficit net worth. So that I think we should be talking about the net increase or decrease of net worth by these transactions. That's what put me off when you started to speak about the \$54,000. I considered in a complete context and not as an individual figure.

But part of the assets that were included, that you just referred to, that turned out to be there, were these cores; is that correct?

That's correct.

To which in footnotes 3 and 4 Mr. Hourihan had indicated they were of doubtful value?

Yes. They were not of doubtful value to us.

Q Had you already contacted English Plessey as--

I had already contacted English Plessey when I discovered they didn't consider.

0 That was some time after the closing?

That was some time after the closing. When I went to notify the Plessey Memories Division that we had

1 hph5 Albert-cross these cores, and to find out whether they should be shipped 2 out or not, I then discovered that we did not have the 3 cores and it was after I had sent a telex to England. Sequentially, at the closing you had Hourihan's statement which showed 65,000 cores. 6 That's correct. As to those in footnotes 3 and 4, he said they 9 were of doubtful value. 10 A That is correct. 11 And that ISL had no present use for it? 12 That is correct. 13 Then it was subsequent to that, that Mr. Hourihan 14 discovered his error and wrote this memorandum? 15 I don't know if that memorandum had anything to 16 do with that error. I have no way of tying the two together 17 because at the time I got that memorandum, I wasn't given 18 the information about the cores. It was either before or 19 after. I don't think there is a tie-in between the two 20 transactions at all. It wasn't through the letter that I 21 found out about the missing cores. I found that out from 22 Mr. Hourihan separately, after I had sent the telex out. 23 But Hourihan does refer to the 13,000,000 miscount 24 of cores in his memorandum, does he not? 25 I don't remember. I would have to read it.

1	hph6 Albert-cross
2	Q Do you want to take a look at that.
3	(Handed)
4	A He does and he says he counted them on March 3rd.
5	We didn't know about it, weren't told about it until much
6	later.
7	Q Incidentally on Defendant's Exhibit CE, did Mr.
8	Kovar give this to you?
9	A I believe he did.
10	Q Didn't you have a discussion about Houritan at
11	the time?
12	A Yes, I did.
13	Q Didn't you agree that he was young and overwrought
14	and didn't you say to Mr. Kovar that you weren't too upset
15	about it?
16	A I believe that that was a joint decision. We
. 17	both decided we were not too upset about it.
18	MR. McCONNELL: Your Honor, if I could just have
19	half a second.
20	THE COURT: Why don't we take our recess and then
21	you can find your papers.
b3 <sup>22</sup>	(Recess.)
23	(Jury present.)
24	THE COURT: All right, Mr. McConnell.
25	BY MR. MCCONNELL:
	1739

1	
2	
3	
4	
•	
5	
6	
v	
7	
8	
·	
9	
10	
10	
11	
12	
13	
14	
15	
16	
10	
17	

19

20

21

22

23

24

25

hph7

Albert-cross

Q Mr. Albert, I show you again Plaintiff's Exhibit

119, and I believe I asked you at pages 27 and 28 of your

deposition whether you recall seeing that before. First

you said you didn't, and then you looked at it and you said,

"I may have prepared it." Does that refresh your recollection?

Do you want to see your testimony.

(Handed)

A I may have prepared it. I don't know.

THE COURT: You don't remember?

THE WITNESS: I don't remember. I think there was some question in the deposition, in my mind, as to definitely whether I had prepared it or not.

Q Do you have any idea who might have prepared it, if it weren't you?

A No, I don't know.

MR. McCONNELL: That's all.

THE COURT: Mr. Maloney.

REDIRECT EXAMINATION

BY MR. MALONEY:

Q Mr. Albert, in making your computation of the need for \$600,000 and later computing the need for \$800,000, did you include the \$180,000 in both calculations?

A Yes, I did.

Q I show you Defendant's Exhibit M, which is the

1740

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

hph8

## Albert-redirect

1

November statement and a copy of your notes which were plaintiff's Exhibit 118. Referring to the second page of your notes, there is an entry "Loss for November 30, 1969, \$43,000. Loss for December, \$27,000. "And, in parenthesis, there is a total of \$70,000. Do you recall what relationship those figures had to the November statement which Mr. Hourihan furnished you?

9

A Yes. The net loss before other expenses was \$43,000.

10

Q At November 30th?

12

A At November 30th. And the estimated loss that Mr. Hourihan projected for the month of December was \$27,000, totaling \$70,000 for the year ended December 31, 1969.

14

15

13

Q What would that \$70,000 loss represent?

16

17

18

A That would be the total loss to December 31, 1969, as projected by Mr. Hourihan before other deductions.

Q So that the \$43,000 is labeled by Mr. Hourihan, "Net profit before other expenses"?

19

20

A That's right. He has it in brackets showing

21

Q And then when the other expenses are subtracted,

22 23

that's where the loss of \$169,000 comes from on the November 30th statement?

24

25

A That is correct.

Could the \$70,000 loss, before other expenses, 2 Q be the \$70,000 loss referred to in Mr. Osborne's report?

It could very well. These figures were developed at the same time.

MR. MALONEY: Thank you. I have no further questions.

> THE COURT: Thank you, Mr. Albert, you are excused. (Witness excused.)

MR. MALONEY: Your Honor, we have no further witnesses, but I would like to offer two exhibits that were not apparently offered in evidence before. One is Defendant's Exhibit AF, which is the memorandum which Mr. Sinsheimer testified to receiving from Mr. Clarke, with the two reports attached, including the famous Clarke-Crocker report, bearing his date stamp of March 5th.

MR. McCONNELL: No objection.

THE COURT: Received.

(Defendant's Exhibit AF received in evidence.)

MR. MALONEY: We would like to offer Exhibit CU, which was our compilation. That has all of them in our possession.

THE COURT: Received.

(Defendant's Exhibit CU received in evidence.)

MR. MALONEY: We also would like to offer pages 17

1742

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

3

1

9

10

11

12

13

14 15

16

17

18

XX 19

20

21 22

23

24 xx

XX

hph10

through 28 of Mr. Carlin's deposition in evidence since there was some indication during his testimony that he didn't understand the context of the questioning, when this was referred to during his trial testimony.

THE COURT: Do we have to clutter up the record? What do you say, Mr. McConnell?

MR. McCONNELL: The witness was here, testified and Mr. Maloney cross-examined.

THE COURT: Yes.

MR. MALONEY: The only matter is a housekeeping matter, your Honor. We cannot find the copies of three exhibits that were marked during the trial. The one is CK, which is the original payroll we prepared.

THE COURT: I've got one marked as CK.

MR. MALONEY: Yes, sir. We can't find the one the reporter marked received in evidence, and we would like to substitute another copy.

THE COURT: Then there was a CK-1, wasn't there?

MR. MALONEY: Yes, sir, we do have that one, CK-1
to which we just added the fifth column.

THE COURT: No objection to that, is there?

MR. McCONNELL: No.

(Defendant's Exhibit CK received in evidence.)

MR. MALONEY: The other two we cannot locate that

hph 11

were marked are Mr. Carlin's letter to the shareholders dated August 11, 1970, and the document he identified as the draft, Exhibit CL and Exhibit AT. We cannot find the copies that were marked by the reporter. With respect to one of those, I think it had been originally offered in the morning as a Plaintiff's exhibit, so perhaps it's among the Plaintiff's exhibits.

THE COURT: Do you remember what exhibit numbers they are? There is no use having it in twice.

1 eoh 1 2 MR. MCCONNELL: 31. 3 THE COURT: I haven't got that marked as received. Was it? 5 MR.MALONEY: Mr. Wallace has them marked received in evidence. 7 MR. McCONNELL: 31 is the same as Defendant's 8 Exhibit CL. 9 THE CLERK: 31 was not received. It was in and 10 then it was taken out. 11 THE COURT: I haven't got 31. 12 MR. McCONNELL: I am sure we have one somewhere. 13 Carlt we do that later on? 14 MR. MALONEY: As long as there will be no objection. 15 These were marked at deposition and we will substitute new 16 copies for CL and AT. AT was the draft of CL. 17 THE COURT: Yes, I remember seeing those two 18 papers, but I didn't get copies of them. 19 MR. MALONEY: The defendant rests, your Honor. 20 THE COURT: All right. 21 MR. McCONNELL: Your Honor, we call Mr. Peter Hewitt 22 as our witness. 23 THE COURT: This is plaintiff's rebuttal. Ladies 24 and gentlemen, we are reaching the end of the trail. You 25 all have big smiles on yourfaces. If it hadn't been for me, 1745

		102/
1	eoh 2	Hewitt-direct
2	we would h	ave reached this sooner.
3		All right.
4		
5	PETER	D. HEWITT, called as a witness, having
6	been	duly sworn, testified as follows:
7	DIRECT EXA	MINATION
8	BY MR. McC	ONNELL:
9	Q	Would you state your full name, please, Mr. Hewitt
10	A ~	Peter David Hewitt.
11		THE COURT: You are not a Scot, are you?
12		THE WITNESS: I am an Englishman.
13		THE COURT: I sort of figured that. All right.
14	Ω 1	Where do you reside?
15	A :	I live at number 9 Village Road, Birkenhead,
16	County of	Cheshire, England.
17	Q	By whom are you presently employed?
18	Α .	Jupiter Electronics Limited, a capacitor manu-
19	facturing of	company, as general manager.
20	QV	Would you repeat that, please?
21	Α .:	Supiter Electronics Ltd., capacitor manufacturer
22	company.	am the general manager.
23		THE COURT: Near Birkenhead?
24		THE WITNESS: Yes.
25	Q F	or how long have you been with that company?

1 eoh3 **Hewitt-direct** 2 A Six months. 3 Prior to that were you employed by any of the Plessey companies? A Yes. I was with the Plessey Company for 17 years. Q Directing your attention to the period either late 1969 or early 1970, did yo have occasion to prepare a report 8 concerning a facility for supply of core stacks and planes 9 to the U.S. market? 10 A Yes. 11 Who requested you to prepare that study? 12 The director of manufacturing of the Plessey 13 Company, Mr. Dalziel, and it was about a facility in Brazil. 14 What was it that you were asked to do? 15 To recommend the space, labor and supervision 16 requirements for a 300-operator core memory facility in 17 an existing plant in Brazil. 18 Were you given to understand what market or 19 markets that plant was to supply? 20 For the U.S. A 21 THE COURT: You said what? 22 THE WITNESS: The U.S.; the States. 23 Do you recall approximately when you were asked 24 to prepare this report? 25 A It was late '69, but I am guessing, it would be

1747

FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

whilst I was there showing the progress of the revenue and

1750

1	eoh	Hewitt-direct	1632
b2 2	the statistic	cs of the supporting order b	ook.
3	Q To	whom did these reports go?	
4	A To	the distribution, the distr	ibution mentioned
5	on the letter	cs. To Mr. Clarke of Plesse	y, inc.; Mr. Crocker
6		emories in the U.K. and to M	
7	of ISL.		
8	Q Dur	ing the period of time that	you were there
9		did you file any other writ-	
10	these monthly		
11	A Non	e whatsoever.	
12	Q Ref	erring to Plaintiff's Exhib	it 16 under your
13		neral" you state:	
14	"We	have plenty of orders for	the next two-three
15		e appears to be no shortage	
16		am here is a pleasure to wor	0
17		very welcome."	
18	Was	that your feeling at the ti	me you wrote this
19	report?		
20	A Prec	cisely.	
21	Q Did	you tell Clarke or Crocker	or anybody else
22		at the ISL operation was a d	
23	A Neve		
24	Q Did	you tell Clarke or Crocker	or anyone else
25		t you couldn't work with Ko	
		1751	
	Sc	OUTHERN DISTRICT COURT REPORTERS, U.S. COU FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580	RTHOUSE

23

24

25

A No.

eoh

Q Did you tell Clark or Crocker or anyone else with Plessey that the ISL staff wouldn't work with you and resisted your suggestions?

A No.

Q Did you tell Clarke or Crocker or anyone else with Plessey that the cable harness business was not profitable and should be discontinued?

A No. What I did say about the harness business was I felt that it would get in the way of due course because the factory had a limited size.

Q So, what was your suggestion as to the location of that business?

A We would find other space elsewhere on the island for the same business.

Q Incidentally, was Plessey doing any cable harness business at its Lisbon plant?

A It had done cable harness business at its cable harness plant, but I am not sure it was coincident with the business in Barbados or not. I think it was somewhat before that.

- Q Incidentally, have you ever met Mr. Sinsheimer?
- A Never.
- Q Have you ever talked to him?

1	eoh Hewitt-direct 1634
2	A Never.
3	Q Have you ever communicated with him in writing?
4	A Never.
5	Q I show you what is in evidence as Plaintiff's
6	Exhibit 11, which is Crocker's February 25th report, "Memory
7	stacks USA", and ask you if that was ever shown to you?
8	A No, I have never seen this documet before.
9	Q I show you what is in evidence as Plaintiff's
10	Exhibit 72, which is the "Integrated world memory business
11	plan" under date of May 8, 1970, and ask you if that was
12	ever shown to you?
13	MR. MALONEY: Excuse me, could I have the number
14	on that?
15	MR. McCONNELL: 72.
16	A No, I have not seen this one either.
17	Q When did you learn for the first time that Plessey
18	was taking over management of the business?
19	THE COURT: Now we are back in Barbados, are we?
20	MR. McCONNELL: We are back in Barbados.
21	THE COURT: All right.
22	A I think I referred to it in my June report and
23	it would be the beginning of that month that I first heard it.
24	Q Did you have any advance notice of the impending
25	arrival of the take-over group?
	1753
STORY OF STREET	

1	eoh Hewitt-direct 1635.
2	A No. I knew a group was arriving, but I didn't
3	know for what purpose.
4	Q When you originally were sent down to Barbado
5	how long was it envisioned that you would be there?
6	A It was planned for a six-month period. I
7	stipulated the limit of six months.
8	Q Did you tell Clarke or Crocker or anyone else
9	at Plessey in May or June that you wanted to go back ea
10	than the six-month commitment?
11	A No, but I did reaffirm that six months was th
12	limit: I was prepared to stay.

ker or anyone else inted to go back earlier

six months was the

During the period of time you were there, March, April, May and June, up to the time of the taking over, were you satisfied with the progress that Plessey-ISL was making?

I was certainly satisfied with the progress that I had made, yes.

What was the reason for your leaving?

The reason I was asked to go back to Lisbon, rather than wait to the end of the six months, was because of a quality problem on the IBM unit in Lisbon that I was running. That was the reason I was given and there was, in fact, a quality problem when I returned.

25

24

13

14

15

16

17

18

19

20

21

22

mpl Hewitt-direct

THE COURT: When did you go back to Lisbon?
THE WITNESS: July 14.

THE COURT: Were you there four, instead of six months?

THE WITNESS: Yes.

Q Did anyone tell you that it was intended that Kovar was going to be removed?

A No, I was told that he had resigned. One of our reports said this.

Q Referring to your March, April and May reports, what were the new sales progress that ISL had made?

A The March sales were \$80,000; the amount of returns that were sent back to the customers was \$26,000; the returns that came back from customers to us was \$42,000, leaving net sales of 64,000.

April sales were \$94,000, the returns that came back to us from customers was \$18,000, and we sent back to customers \$25,000, and there were net sales of \$101,000.

May sales were \$132,000, the net returns back to customers was \$7000, and the net returns from customers was \$17,000, leaving net sales of \$142,000.

In May net sales were \$180,000, our returns back to customers was \$51,000, returns from customers was \$39,000, leaving a total net of \$168,000.

24

25

mp2

Hewitt-direct

Q Would you read the last paragraph of the final report?

THE COURT: What exhibit is that?

MR. McCONNELL: What is the exhibit number on that, Mr. Hewitt?

THE WITNESS: Plaintiff's Exhibit 114 equals
BR.

This is the last report I wrote to Mr. Clarke, copy to Mr. Crocker and to Mr. Gretton, who by that time I had arrived in Barbados. The final paragraph says:

"Thank you for the opportunity of being involved in ISL and working for you, and I wish you and your new staff here and in Boston every success in the future."

MR. McCONNELL: That is all.

THE COURT: We will take a short recess.

(Recess.)

CROSS EXAMINATION

BY MR. MALONEY:

Q You referred to our telephone conversation a couple of weeks ago. Do you recall any of the topics we discussed during that conversation?

A Yes, you asked me whether I ever voiced an opinion on Mr. Kovar's competence.

	11
	II
	H
	II
1	II
	II
	II
2	II
4	II
	II
	II
3	II
	H
	II
4	II
	II
	II
5	II
	II
	II
6	II
•	II
	II
7	II
1	II
	II
	11
8	II
	lî
	II
9	II
	II
	H
10	II
10	II
	II
	II
11	II
	II
10	11
12	II
	II
	li
13	11
	II
	II
14	II
	ll
	11
15	II
10	II
	II
16	II
10	II
	II
	۱
17	I
	I
	I
18	I
	I
	I
19	I
-0	I
	I
20	I
20	I
FIRST SECTIONS FOR	ıı.

22

23

24

25

mp3

### Hewitt-cross

- Q What did you respond?
- A That I had criticized him, but not in any serious matters. I had not used the word "incompetent."
- Q Did you use the words to me on the telephone that Mr. Kovar was somewhat of an amateur trying to run a businessthat was not easy to run?
- A I didn't say he was running a business; Isaid manufacturing, which I did say, an amateur --
  - Q Which part of my statement was incorrect?
- A The part of the statement which says an amateur trying to run a business.

THE COURT: You said something about an amateur.

THE WITNESS: An amateur running a manufacturing

business. Manufacturing is a skill that you have or haven't got. Mr. Kovar does not pretend to be a manufacturer.

- Q Did we discuss the plant layout ch the telephone?
- A Yes, you did.
- Q Do you recall when you arrived in Barbados how the subject of the relayout of the plant came up?
- A Well, it was a bit unorthodox for the type of product we were making to see benches that were suitable on large types of assembly work; you can with a different type of layout get more operators per floor.
  - Q Did you tell me on the telephone that you proposed

such. It was run by Mr. John Norstedt, and this was the principal change I brought about. There was no one person nominated to do the production control work, which I thought was rather necessary. I nominated Mr. George White for that post.

- Q Do you recall what you told me about the order book?
  - A No, I don't, I am afraid.
- Q Do you recall telling me that the order book looked good at first, but later turned out to be not so healthy?
  - A No, I didn't say that.
  - Q You have no recollection?
  - A I didn't say that.

THE COURT: Do you recall what you did say?

THE WITNESS: That statement was not made.

THE COURT: Did you say anything about the order

book?

THE WITNESS: The time when I had the telephone conversations, which was the first communication I had on ISL for about two to three years -- I still had in my possession the documents that I have seen today -- and the facts in those documents show the order book as a fact and not as an opinion.

#### Hewitt-cross

It shows the exact volume of orders on the books, the arrears -- it is an English term, but it is referring to goods which ought to have gone out -- the forward load month by month.

Q Could you tell me which reports you are referring to?

A The ones I just referred to, the memorandum reports to Mr. Clarke, copies to Mr. Crocker, Mr. Gretton in one case, and Mr. Kovar on the orders.

Q I show you Defendant's Exhibit CT in evidence and I ask you if you can identify that document?

A Yes, this is a production schedule, manufacturing production schedule, which is a detail breakdown of these summary reports. This is, in fact, in my writing, but it is not a report as such; it is a weekly schedule.

- Q That was maintained on a weekly basis?
- A Weekly basis to motivate and record progress.
- Q Was there any such procedure in Barbados when you arrived or did you introduce this procedure?

A There was a procedure, but the arrears, in other words, the goods which should have gone out to customers and had not gone to customers, was always rescheduled back in the forward load, which I regarded was wrong, but it was still in the order book.

## 

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1	mp7 Hewitt-cross
2	Q Do you recall discussion concerning the Hewlett-
3	Packard contract with me during the telephone conversation?
4	A Yes.
5	Q Do you recall what you told me?
6	A Not particularly, no.
. 7	Q Do you recall telling me that there was more
8	coming back from the customer than was going out the door?
9	A It is true the first month, yes, these reports
10	once again show the principal movement of returns on this
11	document relate to Hewlett-Packard.
12	Q Do you have any recollection of telling me that
13	the rework cost more than the production of the unit itself?
14	A No.
15	Q You don't recall that?
16	A I didn't make that statement. It is not, in
17	fact, true.
18	Q Do you recall discussing with me the reasons why
19	you left the island?
20	A Yes.
21	Ω What did you tell me during the telephone conver-
22	sation?
23	A During the telephone conversation I didn't tell
24	you
25	THE COURT: Don't tell us what you didn't tell him.
	1761

mp8

## Hewitt-cross

A As I recall it, I told you that I went back because of a quality problem in Lisbon, and my family was unhappy living on the island, which they were.

MR. MALONEY: I have no further questions.

MR. McCONNELL: That is all.

THE COURT: Thank you, Mr. Hewitt.

(Witness excused.)

т6

MR. McCONNELL: We call Mr. Kovar.

ALLAN KOVAR, recalled as a witness on behalf of the plaintiff in rebuttal, having been previously sworn, testified further as follows:

#### DIRECT EXAMINATION

#### BY MR. MCCONNELL:

Q Mr. Kovar, there has been testimony here what is meant by standard hours. Will you explain your understanding of the term?

A Yes. The term standard hours refers to an industrial engineering estimate of time required to perform a certain function or, in total, a certain job. The computation may be based upon actual time studies of the operation or it may be based upon predetermined times, which in our case we use predetermined times and these are based upon actual studies of thousands of thousands of cases rather than having an actual clock time study of the particular job in the plant, so that the industrial engineer can go to a book of these predetermined studies, look to see what operations are involved and find out what the predetermined time is on the basis of previously made studies, many, many of them. The engineer then takes those raw times, basic times, and he increases them

17

18

19

20

21

22

23

25

by certain allowances. Now, the times are based upon an average employee during work at an average pace. It is not the perfect employee. It is not the perfect situation.

It is the average employee working at an average pace under average circumstances. To that basis time, the engineer then adds allowances for personal time, whether it be going to the restroom, whether it be for taking a smoke break or whether it be just for resting, a certain allowance is put on top of these basic times for personal time. In addition, most jobs will involve a certain amount of fatigue. The employee will start normally at a faster pace at the beginning of the day than he ends up at the end of the day, and there was therefore a certain fatigue factor allowance which is added.

THE COURT: The jury and I find that as an experience, too, don't we?

A (Continuing) There is finally a delay factor, delay allowance. Most jobs do not work out delays and so the engineer puts in an allowance for normal delays and the three allowances together are quite often, at least to my experience, what we call PF & D, personal fatigue and delay allowances, and they range from 8 per cent to 20 per cent, in my experience. My recollection is we use either a 15 or an 18 per cent allowance in our case.

These studies and these allowances were based upon, as I mentioned, predetermined times, based upon many, many studies, thousands of studies made in the United States.

THE COURT: Are these studies related to this kind of a job or overall? Are they related to this particular operation in Barbados or are they general studies?

THE WITNESS: They are general studies, which are broken down to relate to particular steps, particular motions, and are ultimately brought down to the particular type of assembly operations we were performing.

THE COURT: All right.

A (Continuing) Because they were based upon studies of North American employees and because we knew that Barbados employees, a Barbados employee was not normally used to industrial atmosphere and discipline and certainly was new to the skills we were developing there, we added a further allowance, what we called a Barbados allowance of approximately 28 per cent.

So that when we finally got to what we skilled our standard hours for a job, it included these various allowances, and in addition included the Barbados allowance.

Now, that standard hour was then the basic

part of pricing system.

Q Would you tell us how you built up your place?

A Well, if, for example, industrial engineering gave me 10 hours standard time for a particular job, I knew that we were not working at full capacity or full tilt, that there was a good deal of time that was not properly utilized and on the basis of the figures I was given, it looked to me as though at least 40 per cent of the time we were not getting back. We were paying for production hours but we weren't getting production back because of either delay, waiting for materials, because of other activities such as that, not having anything necessarily to do with the individual employee's efficiency, but just having to do with the fact that we weren't getting a hundred hours of work out of the group for a hundred hours that we were paying for.

My recollection is what I did was take a 10-hour standard hour figure and increase it by 40 per cent, so that if engineering gave me 10 hours for a job, I would say, "Okay, we're going to pay for 14 hours in order to get the 10 hours the way we're presently utilizing labor," and I would then use the 14 hours in computing all of my costs of a particular job and ending up with the final quote, the base quote that we sent out to our reps.

Q In addition to those adjustments to the estimated hours, did you have any profit factor in your pricing?

A Yes, indeed. In determining or in computing the base price on any quoted job, we had a minimum of 20 per cent profit at the high end, at the top volume end. Sometimes we didn't get to that because we thought there actually would be higher volume.

For example, if we had a request for a quote, for 10 pieces, a hundred pieces and a thousand pieces, we would build up the cost at those various levels, material cost might be different because of volume differential, the labor cost might be somewhat different per unit because of increased deficiency with a larger group as compared to the smaller number --

MR. MALONEY: Your Honor, I don't know what this is in rebuttal of. I don't think this testimony can be accepted as rebuttal. It sounds like we're trying to start the case over again.

MR. McCONNELL: Your Honor, I'm going to be done in a half an hour at the most. This does relate to what we have in documentary evidence and that is, they took our standard times and automatically doubled them and priced themselves right out of the market, and --

MR. MALONEY: There is no evidence to that

Kovar-direct

effect, your Honor.

MR. McCONNELL: Plaintiff's Exhibit 40.

That's exactly what Mr. Sweeney says he is doing.

MR. MALONEY: I think we should refer to the document and the witness should testify as to the document.

MR. McCONNELL: All right.

BY MR. MCCONNELL:

Q I show you Plaintiff's Exhibit 40 in evidence, and direct your attention to the sheet, page 6, twice built-up procedure, and ask you what Sweeney was recommending be done with the standard hours from Barbados.

A He specifically says Mr. Gretton and Mr. Hourihan were advised to double the estimated weaving hours.

MR. MALONEY: I continue my objection, your Honor.

THE COURT: I don't think we want to get into it very deeply on this, but I think the witness can testify as to what he did, and I think by the same token perhaps it would be interesting to know on the basis of what he did how profitable the business was. That's the important thing, it seems to me. You hade all these studies, working time and the rest of it, and you put in a profit factor. Did it work out all right? Did you make a profit?

1

3

5

6

7 8

9

10

11

12

13

14

15

16

17

18

19

20

21 22

23

24

25

THE WITNESS: No, sir.

THE COURT: Why not?

THE WITNESS: We never got to the volume level over an extended period of time, which would have allowed us to reach those figures and primarily because of the delays in getting materials, we could never operate other than on a start-stop basis.

The figures, while they're all correct --THE COURT: You had all those figures, made the studies, but unfortunately, it didn't work because you didn't get the volume and you didn't have the material.

THE WITNESS: That's correct, sir.

BY MR. MCCONNELL:

- 0 Did you also have a profit factor built into your cable harness work?
  - A Yes, indeed, the very same profit factor.
- What would be the effect of doubling the standard hours on any price built up?
  - The effect of that --

MR. MALONEY: Objection, your Honor. I don't know which we're referring to now, whether we are referring to the standard hours Mr. Kovar started because of his allowances for different factors, or whether we're taking the net figure and doubling.

THE COURT: I'm not clear on that either.

I think he said he is referring to page 6 of Plaintiff's

Exhibit 40; is that right?

MR. MALONEY: Yes, sir, but this is a report prepared by a gentleman from Plessey. This is not a report prepared by Mr. Kovar. I don't think Mr. Kovar is qualified to interpret what Mr. Sweeney meant here unless he discussed it with Mr. Sweeney. I think it's a matter for legal argument.

THE COURT: You left then on July 6th, is that right?

THE WITNESS: Yes, your Honor.

THE COURT: I think the only point is, you used these particular standards and for the reasons you state you weren't operating profitably and Sweeney, if they wanted to do it, is increase the weaving time by 50 per cent, and that would raise your cost, wouldn't it?

THE WITNESS: Yes, sir.

THE COURT: And if you weren't making any money, they obviously wouldn't make any money either.

THE WITNESS: They wouldn't make any money for a different reason. They would price themselves out of the market.

THE COURT: Their competitors would put in a lower

1	hpp Kovar-direct 1652
2	price?
3	THE WITNESS: Right.
4	BY MR. McCONNELL:
5	Q Did you have some kind of a charter from the
6	Barbados Government?
7	THE COURT: Who?
8	MR. McCONNELL: ISL.
9	A ISL had a specific charter as an approved exporter
10	which permitted it to manufacture and assembly memory products
11	computer products, electronic measuring products and other
12	electronic devices. The charter given to us by the govern-
13	ment included all the forms of work we were doing, cable
14	harness, printed card
15	THE COURT: I don't really know what this is
16	rebutting.
17	MR. MALONEY: We will stipulate they had a charter,
18	your Honor.
19	MR. McCONNELL: The implication was
20	THE COURT: I don't think there was any such
22	implication. I take it what you are saying, and I think that
23	came out too, that you had an arrangement with the government,
24	where you brought in materials and used them in manufacturing,
25	andyou wouldn't pay a duty.
	THE WITNESS: That's right, sir.
	1771

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

ŭ

MR. MALONEY: Your Honor, I think that's the problem in the United States.

THE COURT: There is duty down there too, here and there. It works both ways. But, I think that has all been covered and I don't see why we have to get into this again.

- Q As part of the acquisition, was your charter assigned to Plessey?
  - A Yes, sir.
- Q When Clarke and Crocker were down in February, was that one of the things that was being done?
- A Yes. They asked for the government to give them written assurances that our approved export status including these various products would be assigned to the new company, the government gave such assurances to them.
- Q At the time you were discussing with Clarke the changeover from your customs broker, Freight Brokers

  International to Barnett, did you advise Clarke of the necessity for licenses being obtained?
  - A I did.
- Q Would you explain what this so-called split salary arrangement was for the expatriate employees?
  - A Yes, sir.

We determined what the going rates were for

1	. hpp Kovar-direct 1655
2	THE COURT: How did you go about that?
3	THE WITNESS: The Barbados employers association
4	had surveys which we utilized.
5	THE COURT: I don't know what your salary was,
6	but what would your salary have been if you had been in a
7	comparable position in another concern?
8	THE WITNESS: I think it would have been about,
9	I think, around \$15,000 to \$18,000 a year. I'm guessing,
10	your Honor, but I think that's fairly close. That would
11	be in Barbados.
12	THE COURT: This is something you wouldn't get
13	as an expatriate?
14	THE WITNESS: No way.
15	THE COURT: This is something to make it possible
16	for the British and Americans to go to Barbados to feel that
17	they can come out with a decent pay after taxes?
18	THE WITNESS: That's right, your Honor.
19	THE COURT: How did you do it?
20	THE WITNESS: We set it up, the difference in
21	pay, between the Barbados level and that which we needed
22	to entice them down to Barbados. It wouldn't be paid .
23	to their account, their own checking account, which in most
24	cases was set up in Nassau, in the Bahamas.
25	THE COURT: Why Nassau?

THE WITNESS: That was so the entire payment would be received outside the United States for services rendered outside the United States and it is still my understanding the United States does not tax up to \$20,000 on income earned outside the United States for an individual who is livingoutside the United States.

## BY MR. MCCONNELL:

- Q Was the Barbados Government aware of this arrangement?
- A Yes, indeed. It was suggested to me personally by the Prime Minister.
- O Did you have an inventory control system, Mr. Kovar?
  - A We did.
- Ω Did you also have a production cost control system?
  - A We did.
- Q Did you also have a system for requests for quotations?
  - A We did.
  - Q And were those procedures all reduced to writing?
- A Yes, they were. We had a standard procedure manual and those amongst many other procedures were reduced to writing and put in that manual and distributed to all

U.S.

volved?

THE COURT: What would that support have in-

aid for Mr. Keppel to call on customers withour reps, to learn specific engineering problems they had, specific engineering requirements that they were looking to, rather than just in some cases boys doing so. As a matter of fact, I had already commenced to transfer the purchasing function from Intersil to Plessey, because we did need stateside and had always had stateside purchasing functions.

What I wanted was to have someone, a professional buyer, performing that actrather than a professional customs broker performing that function. I would have kept the cable harness business and continued to solicit it, other forms of electronic and electromechanical assembly work, because I thought that it was quite evident that it was a profitable business, there was a substantial volume of it available and there were facilities on the island where work could be transferred to under the direction of Mr. Launius who had been groomed for that activity. I would have continued the personal relationship with customers that we had been developing for the

last two and a half to threeyears, and I would not have allowed some of the customers to subsequently allege that there were material shortages and other reasons why they shouldn't pay their bills to us, and I would have renegotiated our core purchase contracts as I had in the past. What I'm getting at, your Honor, is that the price of cores followed a historical pattern of coming down in price.

As volume increased, as the producers of cores worked out the bugs of manufacture, the price kept on coming down and it had been our experience in the past, and I believe it would have continued to be our experience, as those prices came down we would renegotiate the price for those cores.

T7 5

THE COURT: Of course, all that is a lot of ponderables such as wages, cost of the basic materials, inflation. You can't be sure of that, can you? I mean there are a lot of imponderable factors the other side.

THE WITNESS: There are indeed. It is my understanding, your Honor --

THE COURT: It was a hope that all the other conditions being the same that if you could swell the amount of materials you could use, you could try to get them cheaper?

THE WITNESS: That, in fact, did happen in the marketplace, your Honor, during that period of time.

THE COURT: During that year?

THE WITNESS: It was a consistent thing that had happened for the number of years that I had been associated with the business before and continued to my knowledge through the measuring period and thereafter.

I think what had happened, there are records in evidence already and there has been testimony to it, your Honor, that in July of 1969 we had promoted Mr. Norstedt to production manager, there had been a surge in the volume of business we were doing, we were starting to catch up on arrears, there was a new ground swell of morale as well as of production and then we hit the financial crunch again where we couldn't get materials in and we experienced for

eoh2

## Kovar-direct

able to get materials, not being able to continue production on a job other than on a hit or miss basis.

That, in turn, compounded normal quality problems.

We were dealing with a product that had to be 100 per cent correct and by starting and stopping, by using secondary materials or by waiting until proper materials came in, we were compounding the normal problem of trying to produce a 100 per cent perfect product.

When Peter Hewitt came in in March when we had the \$600,000 additional capital and when we started getting materials flowing again, there was, I believe, a very, very substantial improvement made which reflected not only in the morale of the employees and the productivity of the group, but, more importantly, in what was happening in production and in shipping.

We believe that we had the kind of relationship with a sufficient number of customers that the orders that had been forecast for by our sales reps was a reasonable amount and certainly the reduction which I made of that in terms of our own projection, one-third reduction, I think left us in a position where we could --

MR. MALONEY: Your Honor, I think this is going way beyond --

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

ı

eoh3

#### Kovar-direct

THE COURT: We are getting a dissertation.

MR. MALONEY: Mr. Tucker was here on the stand and he was there during the entire measuring year and questions could have been asked of him. If there was any customer impingement by Plessey, Mr. Tucker could testify to that from personal knowledge. Mr. Kovar is just speculating and I don't believe that is fair to the defendant.

THE COURT: I am going to adjourn now anyway until tomorrow morning at 10 o'clock. You are excused until then, ladies and gentlemen. Have a nice evening.

(Adjourned to March 26, 1974, at 10 A.M.)

SCIENTIFIC HOLDING COMPANY, LTD. vs. PLESSEY INCORPORATED

> March 26, 1974, 10 A.M.

THE COURT: Good morning, ladies and gentlemen.

Thank you again for being here on time this morning, as

every morning. I'm grateful for that.

You may proceed.

A L L A N K O V A R, resumed.
DIRECT EXAMINATION CONTINUED
BY MR. McCONNELL:

Q Mr. Kovar, in your opinion, what if any effect did the establishment of the facility at Boston have on operations during the measuring year?

A It had several effects. One, as has been testified, the original purchasing function was transferred to Farmingdale, and Mr. Tito was hired. Subsequently, during the measuring year, purchasing function was then transferred to Maynard, the Boston area. Mr. Tito was dismissed and there was another change in the purchasing personnel and another change in the purchasing procedures.

MR. MALONEY: Your Honor, I object to Mr. Kovar's characterization of Mr. Tito's being dismissed. As I

employed, Mr. Keppel and Mr. Boyce, and as Mr. Ballantyne

2

3

5

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

b2

MR. MALONEY: Objection, your Honor. There has been no testimony that Mr. Parr interfered with the --

THE COURT: Yes, I think the point is, Mr. Kovar, just tell us, not things that were interfered with, but tell

hph

us what you think the effect was on the business, the Boston operation. I think counsel is right. Don't use adjectives but try to tell us what effect that had on Barbados.

THE WITNESS: Well, once quotes were no longer tied to the costing of Barbados and once they were delayed or as they started to be delayed in being given out --

MR. MALONEY: Your Honor, I object again. There has been no testimony they were not tied to Barbados. Mr. Gretton indicated they still did the costing of the standard hours and so on in Barbados and that was shipped to Mr. Parr in --

THE COURT: Of course that is for the jury. The point is, and the point is well taken, you are a lawyer, Mr. Kovar, as well as a businessman, I know, and in your testimony you are being a businessman and not a lawyer. Don't use these words of interfering. Tell us as a businessman the practical effects as you saw it, of the Boston operation. Can you do that?

THE WITNESS: I'll try, your Honor. I think in placing the responsibility of pricing and of preparing quotes, not only 2,000 miles away in geographical distance, but away from the plant, away from the personnel who were involved in the production and in the determination of --

THE COURT: You think it reduced the efficiency

hph

Kovar-direct

another location and having it run at a different plant in Barbados.

THE COURT: It wouldn't be in the Barbados plant?

THE WITNESS: That's right, in another facility.

THE COURT: You said you would have done it

profitably in Barbados. You said that yesterday afternoon.

THE WITNESS: Yes, sir.

Q In your opinion, what if any effect did the relay out of the plant in Barbados have on operations -THE COURT: I don't understand the question.
What do you nean by relay of the plant?

Q The changing of the benches to these individual work stations.

MR. MALONEY: Your Honor, that's not a matter of opinion, what the people testified to, and the plaintiff has had the opportunity to call other witnesses to --

THE COURT: They said the setup in the plant was changed from one setup to another, and the plaintiffs that would increase the efficiency and told the jury why. I think Mr. Kovar can answer, if you will, his views having operated the plant under the old system. Would you answer that question.

A In my opinion, there were two effects. One, you had testimony, I think from Mr. Ballantyne, that both he

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

**b**3

THE COURT: Somebody said the differences were relatively small.

THE WITNESS: That was movement within the same floor. We had one open production floor on two levels, two floors.

THE COURT: They didn't have to move very far then?

THE WITNESS: That's right.

THE COURT: All right.

Q In your opinion, what if any effect on operations, operations during the measuring year, did your dismissal have?

A I think it did have an effect on that, one, the staff was told only that I had resigned. We were, I think, as the figures indicated, improving the situation rapidly in Barbados, and in mid-June, the staff was advised that I had resigned without any further explanation, and Mr. Hewitt was told he was going to be transferred back to Lisbon and a brand new man brought in. In my opinion, that had to have an adverse effect not only upon the employee morale but on productivity because again, personnel change methods that tie in with different personnel.

MR. MALONEY: I object. Mr. Ballantyne testified Mr. Kovar was not at all involved in the production activity

goal because an additional \$2,000,000 of sales in the

1 rmp3 2 come back and talk about the schedule. 3 (Jury excused.) 2 4 MR. MALONEY: There is one other thing we spoke about yesterday, and that is since we could not locate the 5 6 copies of Mr. Carlen's letter to shareholders we would have 7 new copies marked today. 8 THE COURT: Yes. And then come in the robing 9 gentlemen, and we will see where we will go. 10 (In the robing room.) 11 THE COURT: All right, gentlemen, let's think 12 about the charge a minute. 13 As I indicated to you, I am going to give the 14 general charge that I always give in a civil case, which 15 includes it is the jury's province to determine the facts 16 and so forth, the credibility of witnesses, interested 17 witness. 18 Whom have we got in the way of interested 19 witnesses? We have several of them, I think - Kovar, 20 Sinsheimer --21 MR. McCONNELL: Carlen, Clarke, I suppose, 22 Gretton is still in the employ. 23 THE COURT: Yes. I don't think anybody else is 24 employed. 25 MR. MALOMEY: Dubin and Lewis stand on the same

mp4

footing. They are not interested in the result.

THE COURT: I would not include them.

MR. McCONNELL: No.

MR. MALONEY: Tucker is interested, since he owns 3500 shares in the company.

THE COURT: Yes.

Does anybody come under the denomination of an expert witness really? They are all experts in some way. The only fellow who expressed an opinion, I think, was Kovar.

MR. MALONEY: That is right. He was not qualified as an expert. I don't think they are entitled to consider that an expert opinion. It is far away from the beginning of this trial, but there is absolutely no basis for that.

MR. McCONNELL: It is opinion testimony.

THE COURT: I am not going to charge on expert witnesses.

MR. McCONNELL: I don't think we got an expert in the sense that term is normally used.

And nobody is going to comment on anybody's failure to call a witness?

MR. MALONEY: I am only going to comment generally that we called people with general knowledge of the facts and

mp5

the plaintiff did not. I am mot going to comment why they didn't do it, but these people were equally available to them.

MR. McCONNELL: I got Mr. Hewitt here.

MR. MALONEY: The sales representatives are all available. I spoke to everybody and got Mr. Grey on the telephone.

MR. McCONNELL: Are you going to say that?

MR. MALONEY: No. I am going to comment generally that they are all witnesses with personal knowledge who could have refuted the witnesses we called and they didn't appear here.

MR. McCONNELL: If you thought they would help your case, you would have called them yourself, I suppose. That is the other side of the coin.

THE COURT: I suppose if you do that, I will have to charge that as far as I know these witnesses were available to both sides.

MR. MALONEY: Certainly, your Honor.

THE COURT: Then I will charge, too, on the preponderance of the evidence and I will tell them about the scales and so forth. I don't know there is any need for a circumstantial evidence charge, is there? Do you

mp6

think there is?

MR. MALONEY: I don't think so, your Honor.

THE COURT: I don't really think so. I don't think there are anycircumstances from which they could draw inferences.

MR. McCONNELL: I think there are permissible inferences on the question of fraud.

MR.MALONEY: Unless your research has indicated differently, as far as the fraudulent intent here under the cases we found in New York, the burden is clear and convincing about a preponderance.

THE COURT: Then I am going to tell them how to deliberate, and I think we agreed on a five-six verdict --

MR. MALONEY: No, sir.

MR. McCONNELL: I did, but our friends did not.

THE COURT: It is a unanimous verdict.

Then when I get through doing that, what I want to do is give them some questions, and as I indicated, after each question I will try to review very briefly the contentions as I understand them from your summations, and then give them the law, which I take it will be the law of New York insofar as I understand it on the factors they should consider.

Now, Bob and I have been working on these

mp

questions. As I indicated, I am going to charge on liability first, and then if the jury comes out with liability, then I will hold them and go into the question of damages.

MR. MALONEY: I don't think we object to that.

THE COURT: I think it is the only sensible thing to do under the circumstances.

Now, from the plaintiff's point of view, I have in mind asking questions somewhat along this line:

1. Did Plessey breach paragraph 5-D of the contract, dated February 4, 1970 (Exhibit 3) as amended by the February 18, 1970, letter (Exhibit 4), and as amended on March 2, 1970 (Exhibit 5) by assuming management control on June 9, 1970? Then the form will say Yes or No. That will be the first question.

The second question: Did Plessey breach paragraph 5-D of the contract ... by failing to continue the business of ISL during the measuring year, April 1, 1970-March 31, 1971, in good faith?

I will refer again to the exhibits. Yes or No.

If your answer to either 1 or 2 is Yes, answer:

Did the plaintiff sustain damage by reason of the breaches? which will be later after they have answered the questions 1
and 2.

And the next question on liability would be the fraud claim: Did Plessey defraud ISL into selling the assets and business of ISL to Plessey by deceiving ISL into believing it would be allowed to operate the business during the measuring year in a manner which would maximize profits, when, in fact, Plessey intended to take over management as soon as possible? Yes or No.

MR. MALONEY: May I hear the question again?
THE COURT: Yes. (Reads.)

MR. MALONEY: I think that is objectionable, because it does not tie it into 5-D. We never said we would not take over as soon as possible if they didn't make the \$15,000.

THE COURT: I am just tossing it out.

MR. MALONEY: The fraud would come in if we didn't intend to honor paragraph 5-D.

MR. McCONNELL: The objection can be cured by simply saying they be allowed to operate the business and maximize profits, provided they reach the stipulated profit goals.

THE COURT: Well, if we can work on that.

I am listing these now.

And then I come to your questions. I am not quite clear what you might have in mind.

7 8

1. Did Plessey rely on warranties contained in paragraph 10-D and G of the contract in purchasing the assets and business of ISL? Yes or No.

And 2. Did ISL breach these warranties?

Something like that, something along that line.

MR. MALONEY: One comment which goes not so much to the question as to the charge on the law. Mr.

McConnell has continually adverted to 10-A or B, referring to the financial statements, and that they say they will give us a balance sheet and profit and loss which to the best of their knowledge is accurate. But as to important items, such as inventory and accounts receivable, those were not qualified in any way. It is our understanding of the law there is no requirement that they have intended to mislead us; if they warranted something and if it is inaccurate under the law they are responsible for the inaccuracy. It is not a question of motive or intent.

THE COURT: That is something we can cover.

Is there something you want to have?

MR. MALONEY: Do I understand we are not submitting to the jury the issue of the validity of the March 2nd agreement?

THE COURT: You mean this question of consideration?

MR. MALONEY: Authority and so on.

THE COURT: I don't intend to submit that to the jury. I don't think they made a case out on that.

I am not going to submit that to the jury.

MR. MALONEY: I guessthe main thing I will be interested in is what your Honor has in mind with respect to the instructions on the law as to what is involved in good faith.

THE COURT: Have you got any other questions, other than those two I posed where you think I ought to put in what you contemplate, there is, one, that you relied on them, and, two, did they breach the contract in making the warranties?

MR. MALONEY: No, since you are not going to give them damages, that would come in the second part.

THE COURT: That would satisfy you?

MR. MALONEY: Yes.

THE COURT: Let's decide what we are going to do so we can tell the jury.

MR. MALONEY: You are not charging them on punitive damages --

THE COURT: I will leave that until I get the answer to these questions, the fraud claim, depending on how they answer that.

: |

 MR. McCONNELL: Is it your intention in our summation that we argue the whole case, even though we are only submitting the liability?

THECOURT: Just liability.

MR. McCONNELL: You don't want us to argue damages?

THE COURT: No, I will give you a chance. Keep them separate.

MR. MALONEY: It is almost physically impossible with respect to the good faith issue to talk about what we did, except in terms of how it affected a particular contract of a customer.

THE COURT: That is all right, but you are not asking the jury to compute anything. The question of good faith, you talk about where it interfered.

MR. MALONEY: I can comment on the fact that Mr. Tucker, who was the national sales representative during the entire year didn't give any testimony to the effect that Parr was up in Boston and not down in Barbados and had nothing to do with the pricing?

THE COURT: Oh, sure, both sides can do that.

Well, now, gentlemen, do you think we can sum up this afternoon? Or would you rather sum up tomorrow morning?

Which would you rather do? Let the jury go home today?

MR. MALONEY: I would rather do it today.

THE COURT: I won't charge until tomorrow morning. We will have to spend some time working on these questions and I will have to spend some time on the law.

MR. MALONEY: I think if Mr. McConnell indicated an hour and a half and we have about an hour and fifteen minutes, if we started summing up at quarter to two we should be able to finish by 4.30 -- start at 1.30, and get our summations out of the way. Otherwise, we are going over to Thursday morning, it would seem.

THE COURT: Well, let's get the jury out and I will excuse them until 1.30.

MR. McCONNELL: Fine.

(Proceedings continued in the courtroom with the jury in the box.)

have been discussing the future timetable. It is going to take them a little time to prepare their summations because of the size of the record. We thought, subject to your approval, we might meet again at 1.30 this afternoon and hear the summations, and I will give you my charge in the morning. Would that be all right? In that way it may go faster and you will have the case in hand tomorrow

morning.

. 19

I will excuse you until half-past one. Please do not discuss the case.

THE FOREMAN: That is half-past one today?

THE COURT: Half-past one today.

(Jury excused.)

T3 2

(In the robing room.)

THE COURT: Let's finish up what we were talking about before. My view is that I would like to keep the jury focused on the issues that they are going to get and I don't think it does much good talking about other issues that the parties may have raised in their pleadings or in pre-trial. It works both ways.

MR. MALONEY: Your Honor, there has been some kind of wild reckless charges in the testimony as well. I think it is going to create great confusion in the jury's mind unless your Honor instructs them that with respect to these issues of authority and coercion, there is insufficient evidence in the record for those issues to go to them and it will be terribly prejudicial to us because if I am not permitted --

THE COURT: What is there in the evidence on those issues that you think is prejudicial?

MR. MALONEY: The failure to comment would be prejudicial because they have heard all of this testimony about coercing them at the last moment and so on. All I am asking is that either I be permitted to --

THE COURT: All right.

MR. MALONEY: It is not that we want to harp on the plaintiff's failure to prove them so much as to indicate

eoh 2

that those are no longer issues. I don't particularly care how it is done, whether it is indicated that the court found the evidence as insufficient or the plaintiff has withdrawn the issues, but it must be explained to the jury that the March 2nd amendment has been held to be valid because that is the first question we are submitting to them and all of this testimony about forcing them --

THE COURT: All right, make a note there. I will say to the jury, if it will help you, that on the evidence there is no legal question regarding the March 2nd amendment and that the amendment is a valid amendment to the contract, if that is all you mean.

MR. MALONEY: Plus one thing, your Honor, that it was not coerced because there was testimony throughout the plaintiff's case that we coerced them, that they had the Data 100 loan due, and either I am going to be permitted to comment on that --

THE COURT: All right, and instead of "not coerced", was arrived at freely by the parties in Barbados on March 2nd.

MR. MALONEY: Yes, sir.

THE COURT: I will say that.

MR. MALONEY: Fine, your Honor.

THE COURT: I will cover that. If that will take care of it, I will go that far.

7 8

MR. MALONEY: Yes; fine.

THE COURT: All right.

MR. MALONEY: I believe there might be one other item before we get to the specific questions. Throughout Mr. McConnell in his opening statement and when he asked questions keeps insisting that Mr. Dubin drafted the language of the amendment. It seems to me the evidence --

THE COURT: It was drafted by both of them.

MR. MALONEY: Yes.

MR. McCONNELL: Dubin dictated it. He said, "This is the language we want."

MR. MALONEY. The February 18th letter was clearly dictated by them. He sent a letter to which Dubin agreed.

THE COURT: I think if I say that, I don't know what more is needed.

MR. MALONEY: That will be enough if the court finds the language was prepared by both parties so no inference can be drawn against either party. The legal issue I am getting at is that Mr. McConnell has continued to insist that there should be an instruction that where one party drafts an agreement, it should be construed against them. I wouldn't want that in the case.

THE COURT: I don't think that is in the case.

eoh4

I think these two fellows sat down and dictated this thing.

I don't think there is any question about that. I don't
think there is any question about the authority, but I
don't see any point in elaborating on it.

MR. MALONEY: No. sir.

THE COURT: It is a question of interpretation of the amendment for the jury and we all agree on that. Is that right?

MR. MALONEY: Yes, sir.

MR. McCONNELL: I think that is correct, your Honor. I would like for the record to note my exception to taking from the jury the issue of the validity of the March 2nd amendment. That issue embracing the issues of authority, consideration and duress.

THE COURT: You have an exception.

MR. McCONNELL: Okay.

THE COURT: Now, the first question is: Did Plessey breach paragraph 5D of the contract, dated February 4th, 1970 (Exhibit 3) as amended by the February 18, 1970, letter (Exhibit 4) and amended on March 2, 1970 (Exhibit 5) by assuming management control on June 9, 1970?

I will tell them that on this issue the plaintiff contends that the averaging provision of paragraph 5D of the contract, ISL had until the end of June to average

eoh5

monthly profits of \$15,000 and, therefore, the defendant could not assume management control before the end of June and in this connection there was the testimony of Kovar, Carlen and Lewis.

Plaintiff contends that the meaning of the word "average" means that there must be more than one month's profits and, on the other hand, the defendant contends that paragraph 5D gave it the right to assume management control if profits of \$15,000 were not achieved in May. They contend on the basis of Dubin's testimony that the use of the word "average" was used to preclude ISL from losing management control if after a number of successful months ISL had a bad month.

I think that is really the contention. I will probably revise this a bit, but that is the general idea. Is that the intention really?

MR. MALONEY: Yes. I think it would be Sinsheimer and Dubin; Sinsheimer is the fellow who told Dubin to do it.

THE COURT: Yes.

MR. KOEGEL: I think in our contention ought to be included that they were to be able to include the profits of March and April in the month of May in reaching the \$15,000 level.

MR. MALONEY: In shortening it, we gave them the

**b2**4

eoh6

right to credit March and April, whereas under the February 18th letter they had no right to credit the first two months under the February 18th letter.

THE COURT: All right. I am going to tell them it is for the jury to determine what the intentions of the parties were and if, after considering all the testimony, you conclude that the plaintiff has proved by a fair preponderance of the evidence that paragraph 5D of the contract gave ISL until the end of June to average \$15,000 profits with May, then you may find the defendant has breached the contract.

On the other hand, if you find the plaintiff has not proved this by a fair preponderance of the evidence or if you find the contract provided that the defendant could take over in May, then you will find that the defendant has not breached the contract.

Is that about it?

MR. McCONNELL: Right.

MR. MALONEY: What about our contention, your Honor, that they are equitably estopped from raising that issue by their complete silence?

THE COURT: I have thrown that out, too, equitable estoppel. I don't want any comment by anybody on equitable estoppel. I don't see it here at all.

eoh7

MR. MALONEY: I won't refer to equitable estoppel, but I do have the right to refer to them not testifying to it.

THE COURT: That is only because it relates to the question of interpretation. All right.

I guess that is really the straight factual question in question 1. There isn't any law that I can give them on that that anybody can think of?

MR. McCONNELL: I don't think so.

MR. MALONEY: No.

THE COURT: All right, you agree on that.

The second question: Did Plessey breach paragraph
5D of the contract and so forth by failing to continue the
business of ISL in good faith during the measuring year?

What have we got on that? I take it here some of the points the plaintiff will contend are that they discontinued the cable harness assembly work and that kind of thing and transferred this thing to Boston; failed to provide the sales representatives with timely quotations; failed to provide adequate testimony --

MR. McCONNELL: Excuse me, test equipment.

hph 1

MR. MALONEY: There is nothing in the contract that provides them with any test equipment. It seems to be offered--

THE COURT: I am not really going to say all this.

I am probably going to say that in the course of the summations, you heard the lawyers argue this point and sort of highlight it a little bit. I will do it on the other side too.

MR. MALONEY: Your Honor, the things they have mentioned as interfering with profitability have to be divided into two categories. As far as continuing the business in good faith, I don't think the jury can consider under that issue things we subsequently volunteered to do. There is nothing in the contract that required us to give them test equipment after we put the \$800,000 in. It is something we volunteered to do down the road and now they are complaining the equipment didn't come over fast enough. I don't think that has anything to do with continuing the business. Continuing the business means continuing it with the defective test equipment they started out with unless they could pay us for it.

MR. McCONNELL: Good faith means using your best efforts to make the business profitable.

THE COURT: Under the law, a person acts in good

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

Т4

hph2

1

3

5

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

faith when he uses reasonable efforts to bring profits and revenues. He does not, if he intentionally or reck-lessly does something to destroy the rights of the other parties under the contract.

MR. McCONNELL: I've got one other point, your Honor. Clearly good faith means that. My position is this, on the contract. If their take-over of management was premature and in breach of the contract, then their obligation to run that business after they are in there can be no less than our right under the contract if left in management, namely, to maximize profits. So where I come out on it is, if the take-over is wrongful, then they have an obligation to maximize profits for the balance of the measuring year. Even if the take-over were permitted, not premature, if you will, under the good faith they would have the obligation which your Honor has just said. I don't see how, if under the contract, and clearly this is stated in paragraph 5, that ISL's management will be permitted to remain in management for the measuring year and given the maximum opportunity in their judgment to maximize profits. If we have that right and yet they jump in prematurely and deprive us of that right, it seems to me that their obligation under the contract has to be the same as our rights, if left in. I guess what I am saying, your Honor, is that

1

3

4

5

6

7

8

9

10

11 12

13

14

15

16

17

18

19 20

21

22

23

24

25

THE COURT: I'm wondering whether that doesn't go more into the question of damages again, if they find in the answer to the first question that they have breached the contract.

MR. McCONNELL: I think it does bear on the damage issue.

they have a higher standard or a higher duty, if the

take-over were premature.

THE COURT: I would rather think so. The February 18th amendment says, "The present management shall operate the business during the measuring year and shall have the maximum freedom to operate the business in such manner which produces, in the judgment of such management, the maximum profit available, provided, however, that any policy directive issued by the directors of Plessey shallbe complied with. Notwithstanding the foregoing, if ISL profits commencing with the third calendar year of the measuring year average less than 15,000 U.S. dollars per month or if there have been three consecutive months of losses during that measuring year, excluding the first two months thereof, this paragraph shall no longer apply and Plessey shall have the right to assume full management responsibilities. In such event, however, Plessey shall be obligated to continue the business of ISL during the

hph4

measuring year in good faith."

There is nothing about maximizing profits there.

MR. McCONNELL: The question is what does good
faith mean.

THE COURT: We have covered that.

MR. McCONNELL: Yes, as to what good faith means, as a matter of law. What I'm saying is, if we had a right to maximize profits, and clearly we did under that paragraph, and they jump in prematurely, they are depriving us of that right to maximize profits and, therefore, their obligation is not just good faith but it is the same as our right if left in management, namely, to maximize profits.

THE COURT: I think that point is well taken,
but I think it involves the question of damages, whether
or not they did these things. I think that would come under
damages.

MR. MALONEY: I take it neither side will comment on that issue?

THE COURT: I would like to keep that tied into these questions. I think that's the only way we can make this clear to the jury. The way it sort of looks, it sort of makes it look that the charge will be fairly short and maybe that is right, but I will of course ask you after the charge to make any comments and we can talk about that

hph5

here.

MR. MALONEY: In addition to naming all the matters plaintiffs complained about, would you also include plus he invested \$2,000,000 during the measuring year, not just the \$800,000.

MR. McCONNELL: That's your argument.

MP. MALONEY: That's the sworn testimony of a Certified Public Accountant backed up by documentary evidence and not refuted by the defendant that we put the \$2,000,000 in there.

MR. McCONNELL: You can make that argument to the jury. I don't think it's proper for the charge.

THE COURT: We will give brief contentions on both sides and on the defendant's contentions I think I should include there they did invest money in the plant, in fairness.

MR. MALONEY: I think the evidence is unrefuted that we did not charge them in computing the profit or loss for the Boston facility, which also goes to good faith.

THE COURT: That's right. I want to be fair and balance the contentions both ways and I'll do it very briefly. They have heard all of the evidence.

MR. McCONNELL: Nobody claims they directly charged us with the expenses of the Boston operation. The contention is that indirectly there was an expense and

b2 2

it got reflected in pricing.

MR. MALONEY: That goes to damages. That doesn't go to good or bad faith.

THE COURT: Let me see if I can work that out.

I want to balance these contentions and I want to do it fairly for both sides and then I will indicate the law.

The third question is the one we seem to have a problem with, which I had provided, and that is did Plessey defraud ISL --

MR. MALONEY: I think the third question was whether they sustained damage, your Honor.

THE COURT: That will be later.

MR. MALONEY: I think the fact of damage, without getting into the computation, is part of liability, your Honor. If they can say we took over a month early but there was no damage, period, then we don't get into computation. I think damage is an element of liability. The computation of the precise amount is damages.

MR. KOEGEL: The burden of proof is somewhat different. The fact of damage is to be established more than a computation.

THE COURT: I don't think any harm in that, yes.

We will put that in. Then we get to the third one, which

I had suggested, the fraud claim, and this really is a fraud
in the inception. Your comment is this is a fraud in the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

hph7

inception.

MR. McCONNELL: They misrepresented their intention at the time.

MR. MALONEY: We renew our motion for directed verdict on that one, your Honor. There is absolutely no evidence in this record that the defendant did not intend to honor the contract when it was signed.

THE COURT: I think I will let it go to the jury.

The plaintiff's point is Plessey had this program, and this was giving them an immediate entry in the U.S. market where they had to wait a year, and they intended to run this as a segment of their larger business. That's your point on that?

MR. MCCONNELL: Yes, your Honor.

THE COURT: I think I will put that to them.

MR. KOEGEL: Are you going to mention contentions or is that a one sided --

THE COURT: On that fourth question, I think something like this: At the time Plessey entered into the contract with ISL, did Plessey deceive ISL into believing it would be allowed to operate the business during the measuring year in a manner which would maximize profits when, in fact, Plessey intended to --

MR. MALONEY: Your Honor, may I suggest the only

hph8

possible fraud could be when we signed the March 2nd amendment we did not intend to give them the amount of time which they-

THE COURT: We will get to that. -- when in fact plessey intended to integrate ISL's business with its overall operations, and to take over management of ISL as soon as possible. Is that about it?

MR. McCONNELL: Yes, your Honor, in a nutshell.

MR. MALONEY: Your Honor, the last part of that is still not fraud. We never stated to them --

THE COURT: This goes back to the time the contract is made. He contends in view of this back history, this was all a big deception, and this was Plessey's intention throughout and this was just a way to get in the U.S. market and they didn't care whether this plant made any money or not, they never did care about that, all they wanted to do is integrate it.

MR. McCONNELL: Yes.

MR. MALONEY: I don't think the question as framed yet includes the elements of fraud. It doesn't matter what our intentions were unless --

THE COURT: The fraud comes in deception, did they deceive ISL. I think we can write that out and show it to you.

MR. McCONNELL: What you just gave states my

1 hph9

position.

MR. MALONEY: The problem I'm having, your Honor, the fraud has to relate to a promise in a contract. There has been no claim that we made other promises outside the contract to be breached.

THE COURT: It is a fraudulent inducement to make the contract, which he is claiming.

MR. MALONEY: If it is, it is the first time he is claiming it. Their argument is we never intended to live up to 5D. We never had this great pie in the sky, fraudulent plan before.

the testimony was that Plessey had this operation, the matrix plan, and they had these meetings in London, and there was testimony, I think, how this was going to save a year in the American market.

MR. MALONEY: That's the only reason we bought the company.

MR. KOEGEL: This was shown to them initially and we explained our plan. What we were objecting to specifically, you remarked we deceived them with our intent to take over management as soon as possible. We were going to take over management right away and we said we will let you stay in there but take over right away and --

hph10

7 8

MR. MALONEY: Your Honor, when we signed on March 7th, it couldn't have been clearer to them by that point. If they didn't make the \$15,000 by the time they were required under the contract, we were going to take over. There has never been a dispute about that. The only fraud issue is did we intend, when we signed the March 2nd amendment, to take over even sooner than the amendment permitted us to and that's the only fraud issue.

MR. McCONNELL: I think it goes back to the original contract whether or not we were going to be permitted in management, maximize profits.

MR. MALONEY: Your only right to do that was paragraph 5D. You gave no testimony in the courtroom that you had separate oral assurances other than paragraph 5D.

THE COURT: What he is using is this evidence about the matrix plan and all the goings on. He is using that to argue that Plessey really paid no attention to it and wanted to use it as one of their units.

MR. McCONNELL: Right.

THE COURT: All I am saying is, the jury should focus on that issue.

MR. MALONEY: I still object, your Honor.

THE COURT: You have a suggested question?

MR. MALCNEY: Why don't we pass on that andTHE COURT: I would like to see what you phrase that question to be. 1819

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

ppl

2

3

5

7

8

9

10

11

12

13

14 15

16

17

18

19

20

22

21

23

24

25

MR. MALONEY: All right, your Honor. it on the fraud, you will ask them whether or not there was any damage sustained as a result of the fraud?

THE COURT: Yes.

MR. MALONEY: That will be the fifth question.

I think they should be asked whether or not there was damage with respect to the breach of contract and the fraud. It would be the same as question No. 3.

THE COURT: I think that's fair. In other words, if the answer is yes, did the plaintiff sustain damage.

MR. MALONEY: They have to be asked specifically because it's not in the question. We would have an error in the record unless they were asked whether or not there was damage.

THE COURT: Yes. That's so much for you. Does that cover your questions?

MR. McCONNELL: Yes, your Honor.

THE COURT: What about the defendants on their counterclaim?

MR. MALONEY: I think we're agreeable with the two questions you posed.

THE COURT: And those questions would be 1, did Plessey rely on what is contained in paragraph 10-D and G, on the contract of purchasing the assets business pp2

of ISL, yes or no, and --

MR. MALONEY: Would you refer specifically to the accounts payable and inventory in framing the question, sir?

THE COURT: I will have to tell them 10-D and G do refer to those. We will cover that. Are you contending any fraud on the part of the plaintiff here?

MR. MALONEY: I want you to ask whether or not Mr. Hourihan, in light of his 10-page written confession, intentionally misled Mr. Albert and the other Plessey people. If we're going to have slanderous charges on one side, we might as well have it on theother side.

We certainly have at least more fraud on this side. It is certainly inferred from Mr. Hourihan's statement he put his reputation at stake to the attestations of the December 31 statement.

MR. McCONNELL: I don't agree with the characterization it's a confession.

THE COURT: I think again, in fairness, I don't think there is much to it, but in fairness if I'm going to include the question on fraud on one side, I think in fairness I have to include the question on fraud on the other side. How would we frame that question?

MR. MALONEY: I guess, did ISL attempt to

pp3

deceive Plessey with respect to its financial condition by intentionally overstating its inventory and understating its liabilities on the warranted statement delivered at the closing.

THE COURT: Try this: did ISL, through Hourihan --

MR. MALONEY: Kovar was the president of the company.

THE COURT: Then let's say --

MR. MALONEY: Unless we want to leave names out on both sides.

THE COURT: I think maybe it's a good idea to do that.

MR. McCONNELL: Nobody has mentioned names on your side.

THE COURT: All right, did ISL --

MR. MALONEY: Your Honor will recall they were supposed to deliver in connection with the signing of the contract on February 4, they were supposed to have the statements from Hourihan and they weren't available.

MR. McCONNELL: And you signed the contract without them.

MR. MALONEY: Paragraph 13 something or other of the contract, and I'll give you the specific paragraph,

pp4

your Honor, says the warranties and representation must be true not only at the time the contract is signed but as of the time of closing. There was no danger to Plessey not having the document available at the signing of the contract because the representations still had to be true as of the time of closing, when they did receive the statement. We were also relying on the fact there would be no material difference from the November 30 statement, as Mr. Albert testified.

THE COURT: Something like this: Did ISL deceive Plessey by making the representation and the warranties contained in paragraph 10-D and G of the contract, knowing that these representations and warranties were false with respect to inventory and accounts payable.

Did ISL deceive Plessey by making the representation and warranties contained in paragraph 10-D and G of the contract, knowing that the representation and warranties were false with respect to inventory and accounts payable.

Would that do it?

MR. MALONEY: Yes, sir.

MR. McCONNELL: I think that's a fair statement of the issue. I object to its submission and I would like the record to show that.

THE COURT: You have your objection. If the

pp5

answer is yes, did Plessey sustain damages by reason there-

MR. MALONEY: That would make four questions on the counterclaim.

THE COURT: Right.

MR. KOEGEL: On the fraud, did you want any suggestion from us?

THE COURT: Do you have something?

MR. KOEGEL: I think what we had in mind was something like: At the time the contract was signed on February 4 and amended on March 2, did Plessey deceive ISL to believing ISL would be allowed to continue in management when, in fact, Plessey had plans which would not permit ISL to manage the business and pursuant to these plans assumed the management control without its contractual obligations.

MR. McCONNELL: I like yours better.

THE COURT: Let me have yours and mine and let me chew on them. I think that's a good attempt. Maybe I can get them together.

MR. McCONNELL: "Intended to take over management, notwithstanding the contract provisions."

THE COURT: You would like to add that?

MR. McCONNELL: I'm just suggesting that I

pp6

think that takes care of what he wants.

THE COURT: Do you think this is possible for the jury now?

MR. MALONEY: One final question on the instructions, your Honor -- I will withdraw that. I'll wait and see what happens.

THE COURT: If you have anything you think is going to help me, give it to me.

MR. MALONEY: No, I was just suggesting there has to be some consistency among the questions, their responses, but I guess you will just leave that to see what they come back with and then tell them to go back because the answers don't fit together.

THE COURT: That's right. I think you have helped quite a bit. I think this may make some sense to the jury with your summation. What I will do is, I will put in the contentions which you will put in your summation, and I will put them in very briefly and on the fraud I will give them a little law on fraud, and then it seems to me they are pretty straight factual questions.

Thank you, gentlemen. We will go ahead then.

MR. McCONNELL: I think on the first go-around,
as to the damages, we can shorten it with this.

THE COURT: And I will tell the jury before the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

pp7

summations that you are summing up on the liability and the question of damages will come later.

Thank you, gentlemen.

(Luncheon recess.)

## AFTERNOON SESSION

1:30 P.M.

jury.)

(In open court without the presence of the

THE COURT: Before we get the jury in, gentlemen,

I would like to indicate for the record that you gentlemen

agreed that these summations would be on the basis we have

worked out. The plaintiff would lead off and then the

defendant and the plaintiff would then have a short rebuttal,

which is not the usual rule, but I think we agreed it would

be best here.

MR. McCONNELL: That is agreeable with the plaintiff.

MR. MALONEY: Are we using the same time limitations, your Honor?

THE COURT: Yes, I am using the same time limitations, but that doesn't mean you can't be a lot shorter.

All right, bring the jury in.

(Jury present.)

THE COURT: Good afternoon, ladies and gentlemen.

As I mentioned to you, the next stage of the trial are the summations of the lawyers, which is their opportunity to review the evidence with you and indicate to you what their respective clients are contending here.

I remind you, as I did at the outset of the trial, the evidence isn't what the lawyers say or what I might say; the evidence is what you, the jury, remember and decide.

Remember, also, that lawyers are advocates. It is not only their right, but it is their duty to their client. They will, obviously, review the evidence with youin a way which they think is best calculated from the point of view of their respective client.

Finally, I might just make a general comment.

As you ladies and gentlemen have gathered, the controversy rises out of this contract, which was dated, I believe, February 4, 1970, and amended a couple of times and closed on March 2nd. All of the claims here arise out of that contract.

The plaintiff is making certain claims that the contract was breached.

Another thing I want to say about the plaintiff, the plaintiff here is ISL, although on the masthead it is called Scientific Development. Everybody agrees that is a predecessor corporation and all the evidence talked about ISL so let's think of the plaintiff as ISL. I think it would be better.

The defendant is, of course, Plessey.

ISL makes certain contentions as to the breach

of the contract by Plessey and they make an allegation
of fraud, which counsel will go into with you and I will
also, and Plessey also makes certain claims, which in law
are called counterclaims. They are making counterclaims
against ISL and they also offer breach of contract and also
a claim of fraud.

In thinking about it with counsel this morning, in view of the long trial and this thing is sort of complex, it isn't the kind of thing you and I run into every day, we felt that it would be better if we went to verdict on the issues of liability. See if anybody is liable to the other and if you, the jury, should find that somebody is liable to somebody else, then we will consider the question of damages, how much, and we will defer that until later on until we find out what you find as to liability.

On the verdict on liability, as I will tell you tomorrow morning, I have been talking to the lawyers about this and we think we are going to simplify your task or hopefully simplify your task by coming out with a series of questions which you will be asked to answer and your answers to those questions will constitute your verdict on liability.

I thought I would like to give you that bit of a preview before we hear the summations of the lawyers.

Now, the summations will be that the plaintiff, Mr. McConnell, will lead off for ISL and then we will hear from Mr. Maloney and when Mr. Maloney is finished, I am going to give Mr. McConnell a brief period to reply.

So, with that you may proceed, Mr. McConnell.

MR. McCONNELL: Your Honor, ladies and gentlemen of the jury:

I am going to address myself to the questions that his Honor is going to put to you tomorrow along with his instructions and to the evidence that bears on those questions.

Now, the first question that I want to talk about is whether or not there was fraud on the part of Plessey and that is whether or not at the time they entered into this contract they deceived us as to their intention to abide by the management provisions of the contract, namely, that we would be permitted to remain in management and maximize profits during the measuring year.

Now, the evidence that you have heard shows that plessey had a matrix plan for the United States market.

That plan was drawn up as early as September of 1969 and that plan called for a facility to be established in the United States market, which would have marketing, which would have design engineering, which would have customer

repair and service, which would have testing, and that
facility, in turn, was to be supplied from an offshore
facility where the memory core planes and stacks would be
manufactured. The plan says a low cost labor area.

Now, I believe the evidence also discloses, Mr. Sinsheimer testified that Plessey had been unsuccessful in breaking into the U.S. market; that they had made several attempts without success and except for the one contract, I believe, with Digital Equipment Company that they had not made any penetration of the U.S. market.

As it turns out, ISL was a perfect fit into this matrix plan that Plessey had for the U.S. market. We literally came on the scene at the perfect time.

At the time they heard about us, Mr. Hewitt was already making a study of a possible facility in Brazil where they would make the core planes and stacks.

Then they heard about the availability of ISL and the possibility of acquiring our company. We had a plant, we had a facility, a manufacturing facility. We had four hundred some skilled workers already trained. We had ongoing relationships with U.S. customers where we had already qualified ourselves technically with either prototype work, pilot run orders or were in actual production with these customers.

eoh

We probably had the cream of the crop of the U.S. computer and peripheral industry customers, customers that --

THE COURT: I don't think there is any evidence that you had the cream of the crop. You had some customers.

MR. McCONNELL: I think that is maybe pushing it, but Honeywell certainly you have heard of and Hewlett Packard --

THE COURT: We remember the ones you had, yes.

MR. McCONNELL: Okay. They were big companies and they were the same companies in large part mentioned in the matrix plan as part of the market that Plessey was going to try to break into.

Now, they didn't just proceed blindly into this acquisition. They checked us out. They sent their people down to Barbados.

Osborne, who is their head production man, came over from England and he was there three or four days in December, wrote a report. His report said that any negotiation should proceed on the assumption that this was a viable acquisition.

Mr. Albert came down. He was the chief financial man for Plessey and he was there for three days.

Mr. Sinsheimer reported to the English Plessey

eoh 1718

board early in January -- now, this was before contracts had been signed, we are still in negotiation over the price-and he reported that although the financial condition of ISL was dire, I believe is the word that he used, that his committee and the memory group of Plessey strongly recommended or urged this acquisition as a base for implementation of Plessey's U.S.A. matrix plan.

Now, that is the way they saw the acquisition.

I believe Mr. Sinsheimer in answer to one of my questions said that, indeed, the acquisition would advance their entry into the U.S. market by at least a year and, of course, they didn't have the startup costs and, of course, they didn't have to build a plant facility from scratch and, of course, they got with the acquisition the ongoing relationships with our customers in the U.S. market.

So, we just fit right into the slot. There isn't any question about that. Had we known how well we fit, which of course we didn't learn until later in this lawsuit when we saw the documents, we probably could have negotiated a better deal, but be that as it may, we fit into Plessey's overall worldwide memory plans.

The contract was negotiated and the contract provided -- let me back up.

You will recall that the first -- after the price

7 8

was negotiated, a million four, that of that million four

on an earn out. If we made the \$360,000, then we got the

maximum payout of a million two hundred sixty thousand.

\$180,000 was to be paid down and then the balance was

T2

You will recall that the first draft of the contract said that the management was to remain with Plessey and that we objected to that provision on the ground that if the bulk of the consideration was to be based on an earn-out, we wanted to be left in management so that we could be sure that that earn-out was made and that the profits were earned and that we got the maximum payout. After negotiation Plessey agreed to a management provision which would leave us in management under certain stipulated conditions, and this is paragraph 5-D of the contract, which you will have:

"The present management of International
Scientific, Ltd. shall operate the business during
the measuring year and shall have maximum freedom
to operate the business in a manner which will
produce in the judgment of such management the
maximum profit available, provided, however, that
any policy directive issued by directors of Plessey
shall be complied with."

Then it went on to provide if we didn't reach certain profit levels by certain dates, then Plessey could take over, but, thereafter, was obligated to run the business in good faith.

Then that provision was amended by shortening

the period by 30 days as of the March 2 amendment. I will get to that in a minute.

Now, did they mean it? Did they intend at the time they entered into this agreement that we would be left in management and given the maximum opportunity to maximize profits? Or did they intend at that time to integrate the ISL facility into Plessey's overall worldwide memory plan, and consistent with that plan to take over management itself?

It is pretty clear, I think, from this haguage that had we been left in, we were to have the maximum freedom and opportunity to maximize profits. But the language of a contract, the provisions of a contract are no better than the good faith intentions of the parties at the time they strike that bargain. If they don't intend to abide or honor those provisions and intend to do something else at the time, then you have a misrepresentation as to their true intentions at the time they strike that bargain. That is the nub of our position on the fraud here, that is, that they never intended that we would be left in management and given the maximum opportunity to operate that business during the measuring year.

The ink is barely dry on the contract and it is still before closing when Mr. Crocker writes his

February 25 report. This is after they sign the contract on February 4. Following that Mr. Crocker, who is head of the memory group for Plessey, Inc. worldwide, and Clarke, who is going to run it here in the United States, comes to Barbados and spends three or four days there. They both write a joint report, and then Mr. Crocker writes his report of February 25. I say, the ink is barely dry. He writes:

"Hemory stacks, U.S.A.:

"A Matrix U.S.A. Plan was put before the board in September, 1969. Since that time an opportunity has arisen to purchase a Barbados-based Core Weaving, Assembly and Engineering Company known as International Scientific, Ltd., with an existing agency sales force in the United States.

"The objective of this report is to propose the integration of International Scientific, Ltd. with the Matrix U.S.A. Business Plan to form a virtually independent and total facility in the Core Memory Stack Business."

The object of this report is to propose the integration of ISL with Matrix U.S.A. business plan, to form a virtually independent and total facility in the core memory stack business.

Mr. Crocker goes on to report on a proposed reorganization of International Scientific, Ltd., and here is what he says. Mind you, the contract says that ISL was to remain in management and to be given the maximum opportunity to maximize profits during the measuring year provided certain profit goals were achieved. They still haven't closed yet. Crocker writes:

"The Memory Division of Plessey, Inc. will be under the direction of a general manager controlling both the Long Island and Barbados operations. In view of the nature of the contract with ISL, it is proposed that Mr. Kovarbe made acting general manager, with a clear understanding that during the first 12 months a permanent and more competent general manager be appointed at any time."

They didn't tell Kovar that.

"The Long Island facility will be run by a marketing manager responsible for the direction of the agents and the building up of a minimal inhouse sales force. He will also control a

3

5

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

customer engineering capability covering Test, Repair, Service, and Outline Design.

So what happens? There is a spring joint computer conference meeting in Atlantic City in early May. There are discussions between Kovar and Crocker and Clarke over a three-day period, May 8, 9, 10, at the meeting, on the airplane down to Barbados, and finally when they get to Barbados. Clarke says three things. One, he says, "We intend to establish a facility at Boston and we are going to transfer design engineering to Boston. We are going to have customer service and We are going to have prototype repair at Boston. And we are going to have all marketing at Boston. And it is intended that Mr. Keppel, ISL chief engineer, will report to Mr. McNamara at Boston, and that pricing authority -- and, mind you, this is really the heart of running a business; if you don't have the authority to set your own prices, how can you run a business -- he tells Kovar that pricing authority is going to be transferred to Mr. Parr and he is going to have absolute authority and responsibility and discretion so far as prices.

And, thirdly, that they intend to change the Barbados facility from an integrated full-fuction memory

.

core plane facility into an assembly shop or assembly-type and re-lay out the production floor. He asked for Kovar's agreement.

And Kovar says, "These things that you want to do may make sense to you, Plessey, long range, and it might be in the interest of your worldwide plan, but I have an obligation to shareholders under this contract to maximize profits during the measuring year, and in my opinion these things that you are proposing necessarily are going to tend to depress profits in your term or during the measuring year and, therefore, I cannot agree to these changes which you are demanding."

Clarke says, "You got a conflict of interest."

Kovar says, "There is no conflict of interest.

The contract provides and contemplates that I am to be given an opportunity to maximize profits and run this business during the measuring year, and that is what I intend to do."

Now, what Clarke was suggesting, or, rather, demanding, was that Kovar assent to what was essentially an implementation of Plessey's matrix plan; the things he was asking for agreement of were the very things that were contemplated and spelled out in that matrix plan. They were the very things Kovar was suggesting they were going

22 23

to do in his February 25 report. And, interestingly enough, what he was asking Kovar's assent to had already been put in writing.

I am reading now from Plaintiff's Exhibit 72,
which is dated May 8, before he even had the discussions
with Kovar, May 8, 1970, and it is headed "Integrated
World Memory Business Plan Summary." This is Plaintiff's
Exhibit 72:

"This brochure sets out a plan to develop our existing substantial U.K. memory business, and our newly formed U.S.A. memory business into a worldwide total memory activity. The basis of this plan is the development of an organization integrated under one management."

Not ISL being managed by ISL management with an opportunity to maximize profits for the balance of the measuring year, but Plessey management.

And as to the U.S.A. it says:

"The recent establishment of the U.S.A.

Memory Division forms the basis of the plans for
the U.S.A. with the recent acquisition of ISL
in Barbados advancing these plans considerably.

The decision has already been taken to establish
a Marketing, Engineering and Service Facility in

the Boston area and before very long a Marketing and Engineering Facility will also be established on the West Coast."

There it is in writing. Prior to that time they are asking for Kovar's assent. All right. So what happens? They have obviously got a problem. Kovar is not going to be a rubberstamp manager; he is not just going to fall down and do what they ask him to do. He stated to them and with some heat, that he had an obligation to the ISL shareholders and he intended to carry out that obligation, and he was going to run this business, as he believed he was expected to, under the contract so as to maximize profits. So they got a problem.

Almost immediately, within ten days, there is a meeting held in England, the meetings on May 20 and May 22. And again Kovar knew he had a problem, buthe didn't know what they were going to do, and he was not privy to the plans that were being made. But through discovery in this case we have seen the documents now which were made contemporaneously with the events. We have a memorandum dated May 25 by Mr. Clarke in which he reports on those two meetings, and that is Plaintiff's Exhibit 20. He says, "Arising out of meetings held at Towcester May 20 and Strowger House May 22, Mr. D. Gretton is to join ISL

as manager in charge of operations. The date of the takeover from Allan Kovar should be as early in June as
possible, and this date will be dependent upon arrangements to be made by W.J. Sinsheimer. Gretton and other
people involved in takeover will be available for movement effective June 7. It is agreed that following
the takeover all marketing in North America will come
under the control of Frank Parr assisted by J. MaNamara
for engineer design support for customers; sales will be
promoted through the existing ISL sales organization."

Just what they were asking Kovar to agree to, all marketing to Frank Parr.

The next step is for the finalization of the Boston location and establishing of a service and test facility together with a sales organization.

Again, what they were asking Kovar's assent to.

Finally, Clarke to advise Kovar of the date of the above plan to be put into effect. As soon as this date has been agreed by W.J. Sinsheimer, the intention being for the takeover group to arrive at Barbados plant a day following dismissal of Allan Kovar.

I believe you heard testimony from Mr.

Sinsheimer to the effect that the reason he felt it was necessary to take over management and dismiss Kovar was that he was not satisfied with the trend that the business was losing more money and that, therefore, he felt to protect their investment they had to step in, putting aside whether they had a right to step in, because that is my next point I am getting to.

That testimony should be contrasted with the actual facts, which are that there were 30,000 of sales in March, 100,000 of sales in April, 140,000 of sales in May, 143,000, and everybody knew, expected and anticipated that we were going to lose money the first two months.

The contract expressly provides that the first two months' operations, the losses in those two months would not be counted against us, because we knew that, and we went on our accounting basis from a loss of 18,000 to a loss of 10,000 to a turnaround of 6200. Those are the facts.

Y ou heard Mr. Hewitt's testimony. First of all, Mr. Clarke and Mr. Sinsheimer. Clarke said that Hewitt said the operation was a disaster.

MR. MALONEY: Your Honor, I object to that.

THE COURT: It is for the jury to recollect.

MR. McCONNELL: You heard Mr. Hewitt's testing.

He said that he was well satisfied with the

mmp

progress that was being made and that he felt that the trend was good. Notwithstanding that, there was the Plessey takeover on June 9 and Kovar is dismissed. The takeover team arrives on the 11th or the 14th, and they immediately proceed to implement the matrix plan and the converting of the Barbados facility into essentially an assembly-type operation. They lay plans to discontinue the cable harness business. They reach that decision. They overhaul the pricing and so forth and so on.

Now, it is our position that Plessey never intended at the time it entered into this contract back on February 4 to let us manage this business and to let us maximize profits. Their intention from the beginning was they were going to integrate this facility into their overall worldwide plan consistent with what was set out in the matrix plan, and that when Kovar resisted immediate implementation of that plan, the decision was that Kovar had to go. And he was dismissed. And they did take over the business and they did implement the matrix plan, all of which we say confirms and evidences their intention at the time they entered into the contract.

Now, another question that you are going to be asked to decide is whether or not the takeover was pre-

mature and, therefore, a breach of the contract. We are talking about the February 4 contract as amended by the February 18 letter agreement as, in turn, amended by the March 2 agreement. Everybody agrees they don't agree what the March 2 amendment says. But everybody agrees that the March 2 amendment moved back the time.

Now, our position, I believe, is a straightforward construction or interpretation of that contract.

The contract says that commencing with the month of May we have to average at least \$15,000 per month. Now, if you are going to give any meaning at all to the word "average," it is our position that you have got to have two months to make an average, and that, therefore, we were entitled to the results of not only May, but June as well. So that if we made \$5000 in May and \$25,000 in June, we would have met the \$15,000 averaging provision. For the life of me, I can't see how you can pull any other meaning or construction out of that language.

It is clearcut. You can't average one month.

The illustration Mr. Sinsheimer gave of Hank

Aaron being up one time and hitting a homerun and, therefore, having a batting average of a thousand, I don't

mean to quibble, but he was batting one thousand; he

didn't have an average of one thousand. If he had been

up two times and had gotten two hits, he would have gotten an average of a thousand. Or if he had been up two times and got one hit, he had an average of five hundred.

I would suggest that the better analogy -
I hope I am restating it accurately -- would be the one
that his Honor put, and that is if there was a bonus deal
or a contract with Hank Aaron that if he averaged five
homeruns a month commencing with May, that he would get
an additional \$10,000, let's say, and if he hits two in
May and eight in June, does he average five a month?
I think pretty clearly he does. But with Plessey's
construction, they would say he is out, no bonus.

Now, not only do we have the benefit of the plain meaning of the language and giving meaning to the word "average," but the history of negotiations supports our construction, because, remember, the first draft said management was to be with Plessey, and we asked for management clause, and they said, "Okay, but we want a provision in there that we can take over if you don't make profits of a certain amount by a certain time."

And our attorney, Mr. Lewis, gave some language to Plessey's attorney, Mr. Dubin, which he, in turn, cables to Mr. Sinsheiner in England.

Now, our attorney's language said that com-

mencing with the third month of the measuring year we had to average at least \$15,000. And Mr. Sinsheimer cables back and says he would prefer the language that commencing with the third month we had to make at least \$15,000 in that month and each and every month thereafter of the measuring year.

Now, he knew how to say it. If they wanted to say that we had to make at least \$15,000 in May and thereafter average \$15,000, it is just that simple. He could have said it. So Sinsheimer's language was in the second draft and we cabled back to him again and said, "You have got to have an averaging provision in there." We wanted the word "average." Now, that had to be a change, because we had to make at least \$15,000, and now you get average back in the contract, and if you give any meaning to the word, it means we have the benefit of two months.

T3 2

So, they took over. Mr. Sinsheimer said in his letter of take-over you had to average 15,000 commencing with May; you didn't make 15,000, therefore, we are taking over.

They knew they had no right to take over that business, but they were set on implementing the matrix plan and they were not content to wait until the end of the measuring year.

So I say our position is there isn't any question of a doubt but that their take-over was premature because they didn't give us the benefit of June results. They took over on thebasis of May only. Therefore, we were denied the average.

Now, the next question that you are going to be asked is whether or not, after taking over management, Plessey breached the good faith management provision. The contract provided that if they took over that they had to continue the business in good faith. I think -- I don't want to infringe on his Honor's province, which is to tell you the law -- but I think you are going to get an instruction to the effect that they had a duty to use reasonable efforts to make the business profitable or generate profits.

Now, on that our position is that this was not Plessey's business to run as they saw fit. It was not

their business to run that way until the end of the measuring year. Until the measuring year was complete, they had an obligation to us to operate that business substantially intact without making or implementing any major organizational changes or structural changes in the business.

After the measuring year, they could do anything they wanted to with it; it was theirs, but during the measuring year they had an obligation to operate that business and operate it profitably and we say intact. On that -- I think this is significant -- we have a memorandum in evidence prepared by one of the Plessey people, Mr. Kinkhoph, who shortly thereafter left the company, but here is the way he saw it as to what their obligations were and as to what the limitations were on what they could do with this business short term during the Plessey year.

He says: "This proposal outlines a plan for the initial 12 months phase of operations covering the sales, engineering design, production and customer support of memory products sold in the U.S.A. market by the joint plessey Electronics-ISL organizations. It is formulated to be consistent with the provisions of the recent plessey-ISL acquisition agreement."

Here is what he says: "Two distinct phases are involved. A. Short range, the measuring year. This will 1850

run through approximately 30 April 1971 and is based upon continuation of ISL operations in most instances as they are presently handled with the addition of support from plessey Electronics as requested or where considered necessary to meet objectives."

Then, "Long range. The time beyond the measuring year when Plessey Electronics Corporation shall have met the terms of the agreement and have complete freedom" -- "have met the terms of the agreement and have complete freedom to organize, manage and operate Barbados and associated U.S.A. memory facilities as it chooses. In this phase key functions are planned to be located as follows:

"General management and administration in the U.S. Engineering, design prototype test, applications engineers in the U.S. Customers' support, including repair, reassembly and retest, in the U.S. Marketing and sales in the United States."

Now, they didn't maintain the business or continue the business substantially intact and they did do the things that Kinkhoph in this memorandum said Plessey would only be free to do after the end of the measuring year.

We know that they opened up the facility at Boston. Now, again, long range and once you got by the break in period and all that and the problems incident to

b2

the startup of any new facility, it may have made sense, but the point is did they have that right during the measuring year and was it a breach of their obligation to continue the business in good fare, when they knew that we were opposed to that, but went ahead and did it anyway.

The same as to the plant re-layout. There was testimony here by Mr. Ballantyne that that really didn't upset production, but just the description of it, five weeks involved, and while they were doing it they were doing it during production hours. It involved at least three moves of the production personnel. Maybe they did hold the loss in productivity to a minimum and the disruption to a minimum, but there can't be any question but a structural change in a reorganization of that type had to have some adverse effect on operations near term or short or short term.

On this one item alone, it seems to me, without question of a doubt Plessey has demonstrated its lack of good faith after take-over of management and, apart from the good faith provision itself, we would argue that it constitutes a breach of the agreement in and of itself and that is the decision to discontinue cable harness assembly and what has been referred to here as PC board stuffing or other electrical assembly work. That was part

of the business from which profits were to be generated during the measuring year. In case there was any doubt on that, we specifically requested that the contract be amended or clarified to make that clear. The second draft of the contract said that the profits were to be generated from the business which was principally cores, planes and stacks and the file, the third and final draft of contract was revised to say specifically by deployment of the assets of ISL, such deployment being principally in the manufacture and sale of memory planes and memory

stacks, cable harnesses and other electrical assemblies.

Now, notwithstanding that clear language and notwithstanding their obligation to operate this business in good faith so as to bring profits into existence, a decision is made immediately up take-over to discontinue cable harness work and the only justification that you heard for that was a statement attributed to Mr. Hewlitt that this business was not profitable, which statement was flatly denied by Hewitt. He never said any such thing. We had to bring him from England to say that.

MR. MALONEY: Your Honor, I would object again.

I don't think Mr. McConnell is summarizing the testimony.

THE COURT: It is up to the jury's recollection as to what Hewitt said.

be discontinued?

MR. McCONNELLL: I asked Hewitt: Did you say
to Clarke or Crocker or anyone else with Plessey that
the cable harness business was not profitable and should

He said, no, never.

There is not a suggestion or a hint of that anywhere in his written reports, which are in evidence. The testimony by Tucker was that there was a one million potential with the one customer, Honeywell, alone for this type of business.

Huntoon in his letter said the potential, and he was talking about total purchases, not split among several suppliers, was four million.

Tucker's statement was based on capturing only

25 per cent of that. That business is cast away irretrievably

by this decision to discontinue cable harness work.

Huntoon writes and he says, look, let's really get on the ball with this pilot run that we are running for Höneywell. It's important that we take care of all complaints. It's important that we be on time with our schedules because here is the potential business. We had done the pilot work. The profit was in the production order, which after we had already run this pilot order and prototype work, they were now going to cast away. It

•

4 5

wasn't just Honeywell. Univac, one of the largest computer makers in the country, was interested in whether or not we would do cable harness work for them.

Parr writes back to Huntoon -- Huntoon had written Mr. Gretton about cable harness with Honeywell making sure they were on the ball taking care of the pilot order and so forth and so on -- and Parr writes and he says, your letter has been forwarded to me to reply to and he said, you don't seem to understand. Plessey has made a decision to discontinue cable harness and other electrical assembly work and you are not to take any further orders.

As late as September Clarke, after his visit to Barbados, says in a memorandum, Tucker and his sales reps are still producing inquiries for cable harness and other electrical assembly work. Can't we cut these people off and can't we terminate the sales reps? They didn't want the business because it didn't'fit in with their matrix plan. Their matrix plan called for simply a core memory facility.

Did they run this business substantially intact without making any fundamental changes in it during the measuring year? While we are still in the measuring year the evidence shows that management responsibility and authority for the Barbados and Boston operations was transferred from Clarke to Crocker over in England. Now we have

b3 22

had two changes in management. First when they take over and they don't keep Kovar on to try to assist in any orderly transition, he is dismissed, and the emloyees are told he had resigned, so you have a new crew down there, Mr. Gretton may have tried, nobody is saying he didn't try, but there are some problems which are almost insurmountable and to stop the operation and start up from scratch again and say that that is not going to have an effect on profitability during the measuring year or short term, if it's got to.

Then, midstream they transfer authority over
to England from Clarke to Crocker. They completely revised
the pricing. They didn't ask Kovar how he arrived at his
prices or how he quoted. They just arbitrarily doubled
the hours that he was using and came up with a new pricing
formula and Tucker is telling them he's got feedback from
the industry. Look, I know it takes a quote of six-tenths
of a cent a bit or seven-tenths a cent a bit to get this
business and you're telling me I've got to quote nine-tenths
a cent a bit. I can't get it at the prices you're telling
me I've got to quote.

What does Parr say? He says, I have my instructions, there's a plan and I've got to charge what I'm told to charge and I cannot lower my prices.

1.856

And, so, what happens? We don't get the business.

Just as simple as that. We have the feedback from the trade,

from the purchasing agents, from the buyers and Tucker

in turn was feeding that to Parr.

One more thing on good faith. If these people were really in good faith, why did they refuse to give us any financial information or details on the operation of that business after they took over management not—withstanding our requests for the same both by letter from Carlen and at the meeting in July? Instead they say, well, you don't need them. It's at most a technical breach, don't worry, boys, you're going to make it easily. We'll be paying you the maximum amount at the end of the measuring year. And you know how much they paid us at the end of the measuring year; zero.

Now, let me just address myself briefly to
the counterclaim. The paper doesn't refuse ink and we've
got a counterclaim in this case in which Plessey is claiming
that somehow they were deceived by our financial statements
or representations. Now, if ever there was a company that
was checked out by the other side, this is that case. They
had Osborne down in December. They had Albert down in
December. They had Albert down again in January or early
February. They had Clarke and Crocker there in February

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

•

1 | eoh10

**b**4

and they all wrote reports and the burden of those reports was that this company was in direct financial condition. They knew it. There was no point in hiding that. That is why they were able to buy us as cheap as they were able to buy us. We had very little bargaining position left at that point except we fit into their plan, but we didn't know how well.

Nobody was trying to hide that fact from them and the reports reflect it. They say the company is in dire financial condition; it's going to need an infusion of at least \$600,000 to get it back afloat and that it's probably got a negative net worth, that is, its liabilities exceed its assets.

Where is there amisrepresentation there? Who was misled here? This multimillion dollar giant misled by little ISL with a negative net worth? They came down and they looked us over. How can that be?

plaintiff's Exhibit 111, which nobody seems
to have received a copy of until after the closing somehow,
had attached to it, that was Clarke and Crocker's joint
report when they were down there in February, that had
attached to it our statement for the year 1969 and it showed
that we lost \$400,000 for the year or \$395,000 for the year.

MR. MALONEY: Your Honor, I object. Our counterclaim

eoh 11

has nothing to do with the difference between the three hundred or four hundred thousand dollar loss.

THE COURT: I understand that. It is related to statements at the time of the closing.

MR. McCONNELL: So they knew what our financial condition was. They knew what our financial condition was, they knew how desperate it was. Frankly, they didn't care whether we had a negative net worth of 100, 200, 300 or 500 thousand dollars, they wanted this company because it fit into their matrix plan.

What is the claimed misrepresentation? That we understated payables by some \$32,000 and that we overstated essentially inventory by some \$85,000. What is the evidence on that?

We did understate payables by 32,000, but we also overstated payables by 54,000 or a net error in their favor of 20,000. There were 54,000 of payables, bills owing to customers, which we included in Hourihan's statement, which later turned out to be non-existence. Now, how were they hurt by that?

so, rather than understating payables, we overstated the payables by 20,000 or the difference between the 54 and the 32, 22,000.

Now, the other one, the big thing, the missing 1859

cores. All we represented was to the best of our knowledge we had given them an accurate statement and that our inventories were as we represented them to be. What happens? Somebody reads 13,000,000 cores off a little jar instead of 1.3 million. They drop a zero or maybe they even read it right and they typed it up wrong, I don't know, but the point of it is that the Price Waterhouse people were in on that inventory and count. They missed it, too.

The same as to the double counts on inventory and stores and inventory and work in progress. The Price Waterhouse people were in on that. Why didn't Hourihan have a right to say to the best of his knowledge that it was correct, but certainly there was no intention to deceive anybody.

Finally, right in his statement in footnotes 3 and 4, he says, look, I'm showing 13,000,000 of cores in storage at \$65,000 value, but we got no use for them and they are of doubtful value. Now, if ever there was a flag, and especially to an accounting person, those footnotes flagged it. All right, so they weren't misled. The only people that were misled in this lawsuit were ourselves and we were misled in that we thought that when we got this language in the contract, which would give us the maximum opportunity to maximize profits, that it meant what it said,

but the intention of Plessey was not behind that language and they intended all the time to take over this business and that is just what they did and, therefore, we ask for your finding on the liability issues and the fact of damage.

Thank you. You have been very patient not only for the argument, but for the whole trial and very attentive and I appreciate it. Thank you.

THE COURT: All right, ladies and gentlemen, we will take a five-minute recess and hear the defendant's summation.

(Recess.)

D)14

mmp1

THE COURT: Proceed, Mr. Maloney.

MR. NALONEY: Ladies and Gentlemen, I also want to thank you for your patience and attention. I know it has been a long trial. I hope we have not confused you too much with all the facts and numbers we put on the blackboard.

Now, turning to the question of fraud, I would like to advert to what I told you on the very first day of trial, that the evidence would come out pretty much the way it did come out.

Plessey had various plans, and plaintiff's contention is we went through a circuitous scheme or plan to sign a contract which we never intended to live up to, instead of just taking a straightforward approach with this bankrupt company, that we said, "If you want us to buy you, you have to agree to do certain things."

Now, there are a number of facts that Mr. McConnell left out of his summation.

any contract we knew that the Data 100 loan was due on January 30, 1971. We knew that in a matter of days if we wanted to demand additional provisions in the contract, we just had to sit back andwait; we could have purchased the note. Data 100 didn't want the company. All they

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

mp2

wanted back was their \$200,000.

Now, we could have gone out and purchased their note. We could have paid them the \$200,000. We then could have held the note and stock as collateral, and then we really would have ISL up against the wall. We could have demanded any kind of terms that we wanted in the contract. We didn't do that.

Our witnesses could not even recall the details of the Data 100 loan. They testified that they negotiated as gentlemen, and that various changes were requested in the drafts. We didn't refuse to change them. When they asked for a provision concerning how much money would be lost in the months of January and February, Mr. Dubin wanted \$10,000; Mr. Kovar and Mr. Lewis said that that was unreasonable and they should be given \$20,000 a month, or \$40,000 for the two months, and we agreed to that.

When we disputed the management provision, we worked that out with them. We agreed not to count the write-off of \$\$20,000 of test equipment. So we signed a contract.

Now, just as we are about to sign the contract, whether it is a few days before or after, Mr. Kovar says to us he is not going to be able to keep the business open till the end of February unless he gets immediate infusion

mp3

of \$84,000 in cash. Now, there may have been some other purchaser who would have provided the money. We didn't test that. We gave him the \$83,000 to keep the operation going for an additional month.

Now, again, if we wanted these provisions, if we wanted to start out with the intention of changing the business all around, why didn't we demand at some point that he put that right in the contract at the beginning.

Again, we gave him the \$33,000 so that he could keep the business running for an additional month.

We came to the closing. Well, before we even get to the closing, when Clarke and Crocker go down to Barbados in mid-February, they find out that Mr.

Norstedt, the operations manager who was in charge of all the production of the product, is going to resign on the day just before the closing. Now, again, if we have this scheme to change the business around and boot Mr.

Kovar out as soon as possible, why do we take Mr. Hewitt, who is the No. 1 man in our own plant and have him come over immediately and take over from Norstedt. Mr. Kovar admitted that he had no other candidates to replace 'Ir.

Norstedt. It is common sense if the top man in a production facility leaves and there is no one to take his place, there would have been chaos and whatever their chances

1

5

6

7

9

10

11

12

13

15

16

17

18

19

20

21

23

24

25

of making a \$15,000 profit in however how many months would have been hurt seriously by Norstedt's leaving and their having no one to replace him. But, again, we didn't push him; we didn't demand language in the contract for that. We take the No. 1 man from our plant in Lisbon, who was experienced inproducing the same kind of product, and we sent him over there.

Finally, we come to the closing. At the closing we find out that all the numbers they told us about are all different. At that point Mr. Sinsheimer wants to call the transaction off completely, but Dubin and Albert talk him out of it. We didn't demand any changes; we didn't say, "You have to consent to stop doing cable harness work," or "You have to consent to change the work layout," or you have to do this or that. All we did was we required them to pay interest on the additional \$200,000, because we had lost confidence in them since they underestimated their year-end losses by \$200,000 and because they had lost double the amount they submitted they would lose in the first two months of the year. We said, "We want to shorten that management provision, because we don't have confidence that you are ever going to get up to the amount of profit that you have been telling us you can do."

And, once again, we don't demand changes in the

mp5

2

3

4

5

6

7

8

9

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

contract. Then March, April and May go by. We don't force them to make any changes. We do nothing to interfere with the operation of the business.

Mr. Kovar on February 6, 1970, before the ink on the contract is dry, writes a letter to Mr. Sinsheimer suggesting that we have all these different types of operations in the United States. And if I recall the letter correctly, he said, "We should have some more competent people to assist the sales representatives." And that is what we did at Boston. We hired a marketing manager. That wasn't a secret from Mr. Kovar. There is testimony that Mr. Parr, the new marketing manager, came to the Spring Joint Computer Conference in early May. So Mr. Kovar knew he was being hired. And his hiring was consistent with Mr. Kovar's suggestion that there should be a marketing person in the United States to assist the sales representatives. The only dispute in this lawsuit is who should have the final say on pricing, and Mr. Parr, the new marketing manager, or Mr. Kovar.

engineers in the United States. Also, with the engineering being located in the United States, a United States
prototype facility would also be helpful. That is the

mp6

third thing we did. We did the prototype here in the United States so we would be closer to the customer. There is no point in shipping the prototype back and forth from Barbados. If you are working with a customer developing a new product, it makes sense that you be closer to the customer.

And the fourth item was test and repair.

Again, if I am not mistaken, even though Mr. Kovar thought they were turning the goods around rapidly in Barbados, he suggested it might be faster if it was done here in the United States. So the opening of the Boston facility was discussed by the parites from the very first day.

The only items that were disputed with respect to the United States facility was who would have final say on pricing. And at no time before we took over under the contract, under what we believe to be a fair interpretation of the contract, did we take that pricing authority away from Mr. Kovar, although we disputed with him whether or not he should have it.

Now, as to the item of work benches, clearly from all the testimony I heard there was no proposal about the work benches until Mr. Hewitt went down to the plant some time in March or in the middle of February after the contract had been signed. There is no indication that

mp

anybody who had been to the plant before that was proposing a change in the work benches, or that Mr. Kovar had resisted, or the parties had fought about putting that in the contract.

With respect to the various reports to which

Mr. McConnell refers, I think the testimony is also clear

that Mr. Crocker and Mr. Clarke were businessmen. They

are opeations people; their job is to go down there,

look at the operation, and propose what they say should

be done to make it a better facility. But the testimony

was also clear that Clarke and Crocker were not involved

in negotiating the contract; they were not attorneys;

they had no authority to interpret the contract or to make

final decisions as to what was to be done or not done under

the contract. That final authority rested with Mr.

Sinsheimer.

There has been no testimony in the record that prior to the time that we took over from Mr. Kovar did we impose any changes upon him in the business that were improper under the contract or that were contrary to what the parties agreed to in the contract.

Referring to this report to which Mr. McConnell makes reference, the 1970 Integrated World Memory Business Plan, he implied that this is something that was kept

m

secret from Mr. Kovar. This reads:

"The recent establishment of the U.S.A. Memory
Division forms the basis of the plans for the
U.S.A. with the ecent acquisition of ISL in
Barbados advancing these plans considerably.
The decision has already been taken to establish
a Marketing, Engineering and Service facility in
the Boston area ..."

on February 6. So by the time this was written on May 8, three months had gone by. The only point of dissension is that Mr. Kovar suggested that the facility be in Coral Gables, Florida, or part of it be there and part in Farmingdale, Long Island. Our people, who had been in the memory business longer than Mr. Kovar had been, selected Boston, because, as Mr. Gretton testified, that is where many of the large computer manufacturers were, that is where many of the suppliers were.

I would suggest in this connection that there is some issue as to which is a better site, and I would suggest that you take into the juryroom with you and look at Mr. Tucker's proposed salesprojection on May 24, 1970, and see what potentions he is forecasting for different areas. The New England area and the Southern California

3 11

area show the largest potentials. Those were the two largest potential areas for customers. And that is why Kinkoff in his reports said the facility should be in Boston and a later facility be opened on the West Coast. Certainly, whatever the difference in business judgment there was, that is not evidence of fraud. And as to where the facility would be located, everyone, including the plaintiff, seem to agree that there should be such a facility.

And that is all he says, "The decision has already been taken to establish a marketing, engineering and service facility in the Boston area and before very long a marketing and engineering facility will also be established on the West Coast. A New marketing manager for the U.S.A. has recently been appointed and the Barbados management strengthened by the loan of the manager from the Portugese facility."

Well, Mr. Kovar knew that. The manager from the Portugese facility was Mr. Hewitt, and the new marketing manager was Mr. Parr, who was introduced to Mr. Kovar at the latest at the Spring Joint Computer Conference in early May.

There is nothing in this plan that says anybody implemented a decision concerning the work benches or

22 23

pricing authority, which were the two items that were discussed and negotiated with Mr. Kovar down in Barbados in early May. And, if you recall — the exhibit number escapes me — but during the trial we introduced an exhibit, Mr. Kovar's report to the board of directors concerning these negotiations with Clarke and Crocker. And the only two items he complained about in that report were the pricing authority and the work benches; he didn't complain about any of these other items as being something that was being fraudulently foisted upon ISL.

Now, Mr. McConnell also infers that the fact that at the beginning of the transaction we thought ISL would be a good company to buy because it fit into our plans had something to do with fraud. That defies common sense, because unless the initial investigations by people like Osborn and Albert and whoever else went down there, if they had not thought it was a viable company that could be improved and could be made to work, then there would not have been any negotiations. I don't see what that has to do with fraud. If they all go down there and say, "Don't touch it with a 10-foot pole; don't; it can't be turned around," then there would be no negotiations and no contract. There is no evidence that no one intended to live up to the contract when they

signed it.

Now, as to the matrix plan, that plan is something that somebody drew up at least two months before anyone had heard of ISL. I think since it has been referred to so often perhaps you should take it in with you and glance though it. I don't think this plan was ever implemented with ISL or anything else. At the time this plan was implemented, they were thinking of supplying the stacks and cores from Portugal, from Lisbon, which was the reason, as Mr. Sinsheimer testified, we were unsuccessful in getting into the United States, because the American companies didn't want to depend on a stringing facility that far away or on a company that had no United States facility for building prototypes and doing testing and repair work, or doing the engineering work.

Once again Mr. McConnell referred to Mr. Crocker's report that he had written on February 25, and again I would say that Mr. Crocker was not an attorney, Mr. Crocker was not involved in the negotiations with the contract. There has been no testimony that Mr. Crocker had any direct authority over this operation. The testimony was to the effect that as one of the men, the top men in the memory operation over in Furope who was being used as an adviser to supply technical people, to

have them go down there, to make suggestions as to how the operation could be improved. But the testimony was clear that no one terminated Mr. Kovar and no one limited Mr. Kovar's authority until June 9, 1970, when Mr. Sinsheimer, who was the chairman of the board of the company, who participated in the negotiations, who had participated in the drafting of the contract with Mr. Dubin, made the decision that time had come under the contract when we were legally entitled to remove Mr. Kovar and to take his authority away.

There is no evidence in this record that before that time came anyone impinged on Mr. Kovar's authority, or anyone did anything to interfere with the way he was operating the company.

Now, there may be a dispute as to who isreading that contract language correctly. But I certainly do not think it is evidence of fraud. And we will discuss that at length with respect to the second question. But, certainly, if the testimony shows nothing else, it shows that there was great confusion and disagreement between the various attorneys and parties who got involved in drafting that language. I don't think it would be fair to find some fraudulent intent based on this good faith dispute about what the language meant, particularly in view of the

1

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

fact that the plaintiffs did not protest at the time when we did assume management control; they didn't tell us that our interpretation of the language was wrong.

I believe the final item that Mr. McConnell mentioned with respect to this possible fraud issue was the fact that on or about May 20 or May 22 Mr. Clarke was over in England talking with memory people in England and seeing what technical people should be brought down to the Barbados facility to look it over and make suggestions for improvement when and if Mr. Sinsheimer gave the decision. That is clearly set forth in Mr. Clarke's memorandum. And Mr. Sinsheimer testified that for various reasons he was dissatisfied with Mr. Kovar, he had made up his mind that when the time came under the contract, when the contract gave him a legal right to assume control, that he was going to assume that management control. Clarke's memo indicates that none of the plans discussed in that memorandum were to go into effect in any way until Mr. Sinsheimer made that decision, and only he could make the decision, which he made some time around June 9 after everyone admits the results for May were available.

In addition, Mr. Sinsheimer testified that by checking with the financial people around the middle of May he became aware of what shipments were up to this point,

mp

3

1

2

5

6

7 8

9

10

11

12

13

14

15 16

17

18

19

20

21

22

23

24

25

and it was just a question of it being a physical impossibility in the last two weeks of shipping enough goods over and above what the history of this company had been for the last several months for them to attain the \$15,000 profit level. So he instructed Clarke to get people together who would go down there and decide what had to be done to turn this company around and, finally, make it profitable after Mr. Kovar had run it unprofitably for years. He had our money for three months.

I suggest to you that all the evidence you have heard about all of the problems that Mr. Gretton faced after he got there didn't occur overnight. Mr. Kovar had a lot more problems other than being able to buy materials. Buying materials had nothing to do with the fact that out of 217 released stacks from Hewlett-Packard, 72 of them were in arrears. Mr. Hewitt himself admitted when he got down there more of those stacks were coming in the door than ISL was shipping out. This was aquality problem, and this was a quality problem that ISL had, and it was finally only solved because Plessey agreed to buy a computer which Mr. Ballantyne testified clearly Mr. Kovar refused to buy even after he had Plessey's money in there.

So the problems were a lot more serious than

mp

materials; there were quality problems; there were problems with the customers. They were not paying their bills to ISL, not only because there was a money crunch, they were not paying because they claimed they had supplied materials to ISL that had been used on other people's projects; they claimed they were not getting delivery of product.

Standard Memories owed \$50,000; other customers owed various amounts. These problems didn't occur after Mr. Gretton got there; they were there when he arrived. These problems had developed when Mr. Kovar was still running the operation. He had three months with over \$800,000 of Plessey's money to pay off everyone he owed money to and start afresh, and although there was an upswing in the business, that upswing in the business was nowhere near what he had forecast, and he was not approaching it, and Plessey made the decision that it had to step in if it was going to protect its investment and to take over management and see what changes had to be made in this business to finally make it run properly.

That brings us again to the question of whether the takeover was proper. Now, I think five or six witnesses testified about what this language means.

And it turns partly on the word "average." It also

turns on -- well, let me go back a minute. The plaintiff argues that to have an average you have got to have at least two months. Mr. Sinsheimer and Mr. Dubin suggest when they drafted the language they meant that you have to average from the very first month. Now, let's assume that they are incorrect, that if you just look at the language all by itself and you hadn't heard anybody testify about it, let's assume they are wrong and you had to have at least two months to average. The question then is after listening to all the witnesses who testified here, when was the word "average" to become operable. Was the word "average" to cover the first two months, as the plaintiff claims, or was the word "average" only to cover later months, after they had made that \$15,000 in the first month?

T5 2

Now, I think during trial a lot of the witnesses on the plaintiff's side had a lot of trouble with keeping separate in their minds the difference between shortening from four months to three months and shortening from three months to two months.

Now, taking the February 18th letter, it says, notwithstanding the foregoing, if ISL profits commencing with the third calendar month of the measuring year average less than \$15,000 per month...

Now, we established clearly that under the plaintiff's interpretation its averaging requires two months and you don't start averaging until the third month, the first two months don't count, the third month alone is not enough under their interpretation, but you need the fourth month as well, so under the February 18th letter you would have April and May, which did not count, and then you would have June and July, which they claim would have to be averaged.

Going to the March 2nd amendment, everyone is in agreement that the sole purpose of that amendment, whichever side's interpretation you accept, was to shorten the period by one month. That would mean instead of having the four months of April, May, June and July, they would have the three months of April, May and June. So, under

their interpretation the March 2nd amendment shortened the management period from four months to three months.

Mr. Sinsheimer and Mr. Dubin testified that under the defendant's interpretation, under the February 18th letter, they only had three months. April and May didn't count and they had to make the \$15,000 in the third month, June.

When we come to the March 2nd amendment, those three months were shortened by one month, which meant they had to make it by the second month.

So, under our interpretation the amendment shortened it from three months to two months.

Mr. Kovar for the plaintiff was consistent in his testimony about this; that he always understood that he would have four months under the February 18th letter; that he would have three months under the March 2nd amendment. However, as I recall the testimony, Mr. Kovar never had a face to face discussion with Mr. Sinsheimer or with Mr. Dubin concerning how that intention should be put down in the contract.

As I recall the evidence, that was to be done following the board meeting at which Mr. Kovar and Mr. Carlen were present and this was discussed, that duty was given to Julius Lewis to work out as the attorney for

the plaintiff, to work out the language with Mr. Dubin, the attorney for the defendant.

Mr. Sinsheimer's testimony was consistent. Mr. McConnell pointed to no prior inconsistencies between his trial testimony and what he said in his deposition or what he said in any written document prior to this trial.

Mr. Carlen, however, seemed to be completely confused as to what the language meant in either of the two documents. He testified at trial that under the original agreement they would have four months and that the amendment changed it to three months. But, then, you may recall, I read his deposition to him and in his deposition he had said what the defendant claims at this trial was the interpretation. In his deposition he said under the original agreement we would have had three months. We would have had to make the \$15,000 profit in June and under the amendment we would have had to make it in May.

When I continued to question him about that he then took the position that he did not understand my questions when I was questioning him in his deposition; that he thought I was questioning him about something other than the contract.

Then we pursued it a little further and we learned from the various witnesses that between June 9th

and June 15th, Mr. Carlen was there in the room with all of the attorneys, Mr. Lewis, who had drafted the provision, Mr. Kovar participated from time to time either on the telephone or at the meetings and the discussions, Mr. Shapiro was there and Mr. Matthew Murray, another attorney. According to Mr. Lewis, and I believe according to Mr. Kovar, they all agreed at that meeting that the take-over was one month early.

If Carlen was there, he should have heard that, but now Carlen sat down and he wrote a letter to Mr.

Sinsheimer. He didn't draft it as a layman. We have in evidence the documents showing that that letter was drafted by Julius Lewis. Julius Lewis wrote to Mr. Carlen on June 15th saying:

"Enclosed is a draft of the letter I discussed with you today. I am also sending a copy to Ted Murray and would appreciate any comments either of you may have. Harold Shapiro and I have discussed this and we think the letter might better be signed by you than by Allan and I will tell Allan when I talk with him tomorrow.

"Once the letter has been sent we can decide how to follow it up and arrange a time and a place for a meeting."

Mr. Lewis identified Defendant's Exhibit ASas
1881

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

ŭ

b2

the letter that he sent to Mr. Carlen, which became the letter, dated June 17th, which Mr. Carlen sent to Mr. Sinsheimer.

Iask youwhy, if all of the lawyers sat in the room with Mr. Carlen and they all agreed, as they now claim, that the take-over was one month early, why didn't they say so in the letter to Mr. Sinsheimer? There is nowhere, when you read this letter, there is no reference in this letter to any invalidity of the amendment or the fact that Mr. Sinsheimer had acted one month early; nothing at all.

Now, perhaps they could have had some reason for not saying it to Mr. Sinsheimer in the letter. Julius Lewis says, we will send a letter out and then we will wait and see what action we should take in arranging a meeting. A meeting was arranged. Mr. Carlen came here again with an attorney, Mr. Shapiro, who had been involved in negotiating the contract. He was Mr. Lewis' partner and Mr. Carlen testified that he makes very careful notes -- made very careful notes of the meeting. I ask you to read his handwritten notes and read the typewritten memorandum, which he typed up from them. There is not one word in the memos and Mr. Carlen did not indicate in his trial testimony that in a face to face meeting on July 13th he never said to Mr.

Sinsheimer, "You have taken over one month early."

Mr. Shapiro came here and testified. Mr. Shapiro was involved in all of these alleged discussions out in Chicago where they say they concluded the take-over was one month early. Mr. Shapiro didn't indicate in his trial testimony here that he said anything to Mr. Sinsheimer about taking over one month early.

Now, as to the confusion of the four and three.

At trial Mr. Carlen said, the amendment changed it from four months to three months. In his deposition he had said it had changed from three months to two months. He claimed he was confused.

The testimonay also showed, and he admitted himself that he had discussed the amendment thoroughly with his attorneys by the first week in August, he wrote to his own shareholders, after his face to face meeting with Mr. Sinsheimer on August 11, 1970, he said:

"The take-over was upon conditions imposed changing from three to two months the effective time to raise level of profits per month to \$15,000."

I suggest to you I believe that Mr. Carlen is an honest man. I do not believe that Mr. Carlen intentionally tried to deceive anyone or give testimony that at that time he did not believe to be accurate, but I do suggest to you

that based upon all of these meetings that took place and all of the written documents, that what he thought and believed in 1970 when this transaction took place was that the amendment was valid and that Warran Sinsheimer had acted properly under the amendment and that at some time between 1970 and the date of this trial somehow someone convinced him that it meant something else, but I believe that what the people wrote back in 1970, when the transaction occurred, should be more indicative of what they thought the language meant at that time.

Now, how about Julius Lewis? Julius Lewis seemed to have a little trouble with keeping the months straight, too. Now, Julius, if you recall, was the attorney who claimed he had some doubt about Mr. Kovar's authority, but he gave Mr. Dubin an opinion letter saying everything was all right without saying to Dubin that it didn't apply to the amendments.

Mr. Lewis was the attorney who testified in his deposition, not once, but twice, that he had no recollection of anyone saying anything about Kovar's authority at the closing, but then he came here to this trial and claimed that he had an independent recollection based on having dinner recently with Mr. Kovar.

He made no notes of the closing. For three months

between March 2nd and June 9, 1970, he made no report to the board of directors of ISL that there were any problems with respect to the amendment.

He also testified that under his understanding that under the original agreement they had four months; that under the amendment they had three months. However, as late as December, 1971, when Mr. Lewis had prepared a sworn affidavit for an earlier hearing in his lawsuit, he said:

"On February 2nd and 3rd in long distance telephone calls between myself and Dubin still further changes in the purchase agreement were negotiated and agreed to."

Going to item 3. "Provisions for a three months averaging to determine whether \$15,000 per month profit was earned."

He admitted that as of February 2nd and 3rd he had to be talking about the February 18th letter so despite his testimony in the courtroom during this trial that the February 18th letter meant four months, in December, 1971, he put in a sworn affidavit calling it a three months averaging provision. When we pointed out this inconsistency to him, then for the first time during this trial we heard that the language in the February 18th letter meant five months. Then Lewis said, the first two months didn't

\_

eoh9

count, the three months I was referring to were June, July and August.

When we asked him to explain how he, the draftsman of the language, could have thought in December, 1971, that the first letter gave them five months, when they were here at trial claiming only four months, he was unable to give any explanation.

I say I don't know what the word "average" means. If you just took the word "average" and wrote it on the blackboard, I would probably have to concede that the plaintiffs are right that it means you need two, but I think you are entitled to weigh the credibility of all of the witnesses who sat here and testified. You are entitled to decide whose recollection is the best; whose testimony was consistent with what he wrote down in pieces of paper years ago when the transaction was fresher in his mind.

Now, our witnesses didn't have that trouble.

Mr. Sinsheimer said what he instructed Dubin to do. He told Dubin in the February 18th letter, I want to be able to take over in June. I want them to make \$15,000 in that month.

When Dubir put that in the second draft of the contract, Lewis complained. We shouldn't have to

make \$15,000 every month for ten months and Dubin said, all right, I'll discuss it with Sinsheimer.

Dubin and Sinsheimer agreed that their agreement to put the word "average" in the contract covered only those later months; that there was no discussion with Julius Lewis on the telephone or with Mr. Kovar that that meant they could average the first two months. They still had to make, under the February 18th letter, they had to make \$15,000 in June and if they got to that point and continued to make profits, they could slip in one month down the road.

Under the March 2nd amendment those three months, April, May and June, were reduced to two months, April and May, and they had to make the \$15,000 in May. But we also gave them a benefit.

Mr. Kovar would have you believe that notwithstanding-- at one point in the trial he wants you to believe
that he had all these orders in hand and that his sales
projections and his budget projections were all accurate,
but then the next thing he wants you to believe was that
when we came to the closing on March 2nd, everybody knew
March and April were going to be a disaster. They were
going to lose tons of money, but he gave no explanation
for why this should have happened.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

If supplies are so easy to get; they complained that Gretton and Tito and so on, that we were fouling up on supplies, all you do is go to the man and pay the money and you put it on the plane and it is right down there.

Well, Plessey was coming in and the contract said within one week we had to put in \$800,000 as agreed at the closing.

Milton Albert testified we promptly paid all his bills. What was he doing for those months? Why, if he had the orders in hand, and it is just a matter of going to the supplier, getting the materials, putting them on the plane, why would anybody believe that March and April were going to be loss months?

As a matter of fact, the parties put in the contract, you remember under the February 18th letter, April and May didn't count either way. If he had a loss it didn't count against him. If he had a profit, he couldn't count it. June was the point it started, but under the amendment when we shortened it by one month, then we gave him an additional right. We said that if he had any profits in March and April, if he made \$3,000 profit in March and \$4,000 in April and then he made \$12,000 in May, we wouldn't assume management control then because under the amendment we would let him take the profit from March and the profit from April and add it to May.

Now, why did they sit and negotiate such a provision into the contract if everyone at the negotiation knew that the company had to lose money in March and April? I suggest that that testimony is not entitled to be credited.

Finally, another written document -- two written documents on this point. You recall that Mr. Kovar came and you recall how he testified when he came into the room and Milton Albert and Clarke gave him Mr. Sinsheimer's letter of June 9th saying that we were assuming management control. Now, he says that back in Chicato everybody told him not to react to whatever Mr. Sinsheimer I say that defies common sense. I say when you walk into a room and somebody says they are taking your company away and you think that is in violation of an agreement, you don't just sit moot and say nothing.

What were the first words out of Mr. Kovar's mouth, according to his own testimony? He testified: "What does this mean for me personally?"

All right, you are assuming management control, but are you going to keep me on the payroll? What is my termination pay going to be?

Before they could even get Mr. Carlen's letter of June 17th in the mail, we have an agreement, dated

1889

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1

2 3

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

June 16, 1970, in which we have settled up with Mr. Kovar. We gave him six months' severance pay. He claims that he is entitled to that under English law. I don't know whether that is a fact or not.

He certainly didn't have a right to live in the villa. We let him live in the Villa for six months. Also, that Mr. Kovar would not compete with us.

I don't know whether you are familiar with legal documents, but there are things such as "whereas clauses" in which people recite the facts leading up to the agreement. I would like to read some of the "whereas clauses" from the settlement agreement that Mr. Kovar signed on June 16th.

"Whereas said agreement further provided that the then management of ISL would manage the business and wold be given maximum freedom to operate the business, and

"Whereas said agreement further provided that in the event that the profits commencing May 1, 1970, averaged less than \$15,000 per month, the right of the prior management to ISL have such maximum freedom to operate the business could be terminated by Plessey, and

"Whereas the business has since the acquisition of the assets and good will of ISL by Plessey been managed by Kovar, who was the former president of ISL, and

"Whereas the business did not average \$15,000 profit for the month of May, 1970..."

We put what we thought the contract meant right in the "Whereas clauses" of the settlement agreement.

Now, certainly Mr. Kovar, as an attorney, he conferred with a whole group of attorneys in Chicago, no one told him he had to consent to putting "Whereas clauses" in his personal settlement agreement in accord with our interpretation of the contract and directly contrary to his interpretation of the contract.

Finally, we get a letter from the famous Mr.

Murray who attended all of these meetings and Mr. Murray
is the attorney who reviewed Julius Lewis' draft letter,
that draft letter that Julius Lewis prepared for Mr. Carlen
to send to Mr. Sinsheimer.

"I am also sending a copy to Ted Murray and would appreciate any comments either of you may have."

Now, everyone identified Mr. Murphy as being present at the meetings and going over the letters. On February 22, 1971, one month before the measuring year is up, seven months after all this has happened, he writes to Plessey, Inc., attention: Mr. Sinsheimer.

"Gentlemen:

"As a stockholder of International Scientific, 1891

Ltd., now Scientific Holding Company, I would like to verify certain facts of which I have recently become aware.

I am informed that in June, 1970, your organization undertook to take over management of ISL and that this action was accompanied by a complete refusal to communicate with our management, "etc., etc. Who is Mr. Murray kidding?

Mr. Murray knew about it back in June. He attended all of the meetings.

Now, I suggest to you that the evidence leads only to one inference in this case. Mr. Kovar was not a businessman; he was an attorney. The stockholders had invested a million dollars, which was down the drain by March, 1970. Kovar was down there in Barbados. He is still proposing, he has a budget. We saw what happened with his 1969 budget. Sales were three times what he ended up with and he went from a proposed profit of \$400,000 to a loss, according to Hourihan, on March 2nd of 400,000; according to the audited statement of Price Waterhouse, they lost \$544,000 on a million of sales.

I'll tell you what all these people decided in

June, 1970, when they sat in those meetings in Chicago.

They said, Mr. Kovar is not capable of running this business.

We had better let Plessey take it over, maybe they can

do a better job with their experienced technical people.

b4

4 5

eohl6

Then, when it didn't turn out that even Plessey, you recall Mr. Jones from Price, Waterhouse testified, we didn't put in just the 800,000 we were required to under the contract, we invested, at the end of the measuring year, that operation in Barbados owed other Plessey companies \$1,900,000. We put in the \$850,000 within one week. We ran the Boston facility at a cost of \$222,000, which Mr. Jones testified we did not charge them with.

In addition, because Mr. Gretton could not collect the accounts receivable from the customers because they were complaining about quality and because their materials had been used on other people's projects or had disappeared, they weren't paying. If we wanted to make this business show a loss deliberately, the contract didn't say we had to put in more money over the 850,000. We went out and we bought the materials, we paid for them with Plessey money so they could continue to operate, so Mr. Gretton could continue to produce product. I say if there is any question about good faith, people don't take \$2,000,000 of their own money and put into a business that they want to ruin or they don't want to show a profit.

Finally, you heard Mr. Sinsheimer testify

very clearly and there was no refutation of this, not

only didn't we make money in the measuring year, we didn't

make money in the following year and by January or February 1973 we were still losing our shirts down there because it couldn't be done and we closed the factory. We never made money out of it despite the investment of millions of dollars in it.

Now, you heard Mr. Kovar testify and speculate about what he would have done. You heard Mr. Gretton, who is a qualified engineer, was the number 2 man in our Lisbon plant. You heard Mr. Ballantyne, a qualified engineer who had been hired by Mr. Kovar and had been with the company for two years, was in charge of the quality control and testing of these products.

You heard them testify to the problems we were confronted with and how we tried to tackel them and how we tried to deliver the product as best we could. We changed the work benches around because, as Mr. Hewitt said, you could not produce the amount of product that they were projecting they would have orders for without moving cable harness out of that factory. So, from the beginning of the trial when we heard that cable harness was a great program, now, I believe yesterday afternoon, now Mr. Kovar suggests, well, maybe cable harness would have to be moved out because that's what Fe witt said. Hewitt said, you couldn't keep cable harness in there and re-lay out the work benches

21 22

eoh18

to have enough people to make the memory stacks. Now, we are going to look for another factory site to build a cable harness in.

I don't know when they got this first great order from Honeywell-Lawrence. We know they had an order from Dura in 1969. That is the only order we heard of. Mr. Tucker testified or someone did that we couldn't even finish that order because, again, the materials got lost. Dura wouldn't pay us the balance of the contract.

Now, Honeywell-Lawrence gave us a contract. That contract is established by documentary evidence and was \$8,000 a month. That is all they were given an order for, \$8,000 a month. Not a million dollars, not four million dollars, \$8,000 a month. I think we can put the cable harness to rest if we just refer back to Mr. Huntoon's memorandum to Mr. Tucker.

Mr. Tucker was Mr. Kovar's national sales representative. Mr. Huntoon was his regional representative.

"A quick memo to bring you up to date on Bill's trip to ISL. I amattaching a copy of Martin's report on his QA survey. As you can see, it is a bust. Bill is holding this together by requesting that Honeywell take a look at cables which were to be shipped."

Now, they are lengthy documents. They are

op:

Exhibits DJ and DL. I would ask you, if you have any doubt about what they were doing with cable harness by June, 1970, when we got there, that you read these two memoranda.

They had not even yet put a qualified person in charge of setting up a program. They didn't have any test equipment. They were in arrears. If you look at the monthly sales report, they were in arrears in trying to ship \$8000 a month of cable harness.

Tucker's projections, on his written projection, yes, they were sending all these letters back and forth about millions of dollars, but, if you recall, when I asked him what the Honeywell-Lawrence order would be as late as May 24th, the only additional order he was forecasting was \$100,000 and he couldn't even remember when he was going to get the order.

First he said September and then his Honor questioned him about what the numbers in the columns mean, he didn't even remember that. Now, you remember heprepared this on May 24, 1970, and he forecast a new order for \$100,000.

I suggest to you that after what the Honeywell people saw as revealed in these memoranda in early June, they were not even going to get that additional \$100,000

order.

I think you have seen all our witnesses and I don't think we have to say anything more about good faith. We put our money into it. Mr. Gretton put his heart and soul into it and they tried to do a job. If we made a change, we made the change because we thought it would improve the business.

I don't care what test you apply, legally I don't think the plaintiff is entitled to maximizing profits once we took over because we took over legally. We took a business and we tried to make it show a profit. The business wasn't there.

Mr. Tucker came and testified. We have all these sales projections with customers on them. We didn't lose them or Tucker would have said we lost them. He would have known.

We did our best and there was no way either

ISL or Plessey could make any money in that factory during
the measuring year or during any other year because the

problems were too great.

Thank you.

THE COURT: All right, Mr. McConnell.

MR. McCONNELL: I just have a couple of short points, your Honor.

Mr. Maloney asked if Plessey's intentions were as we allege not to let us remain in management and maximize profits during the measuring year, why didn't they straightforward put that in the contract? The answer to that, I think, is twofold.

One. At the time we were negotiating this contract we were still negotiating with other possible acquisitioners or acquirers of the business and they knew that and they wanted this business because it fit in their plans.

Secondly. If indeed their intention was as we allege, it didn't make any difference. They could put it into the contract. They could satisfy ISL. Okay, we'll give you the language, the language is there, but the intention is not because notwithstanding what we put in the sontract we intend to take over the business anyway.

As to why they kept us afloat and didn't let us go bankrupt and then drive an even better deal, we were no good bankrupt. They had to keep us afloat. That's why they put the money in to keep the business going until the closing. They didn't want a bankrupt company. They wanted us alive with our customer relationships on-going.

Now, as to the prematurity of the takeover.

I don't know why we have to make this complex or complicated.

The contract says commencing in May is when you average.

It doesn't say commencing in June. It doesn't say later on in the measuring year. It doesn't say you have to make at least 15,000 in May and thereafter average. It says you have got to average commencing in May and, if I heard correctly, Mr. Maloney said he would concede that "average" means two months normally.

THE COURT: I don't think he said guite that.

MR. MALONEY: I don't think so, your Honor.

MR. McCONNELL: If he put it on the blackboard or something to that effect, normally he would concede that "average" meant two months, all right.

MR. MALONEY: I believe I said that if we assumed,
I would concede for purposes of the argument that it means
two months, it still had to be judged in the light of the
testimony of the witnesses.

THE COURT: That is right. I think that is right.

MR. McCONNELL: All right. I think it is pretty clear, you have got to have two months. That is what "average" means. That is what the contract said.

They said we didn't tell them that their takeover was premature. I don't know under what theory
we have to go around and spin out and spell out for them
all of the grounds which we claim show that their takeover

2

3

5

6

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

25

is illegal or premature. If they take over early or prematurely, they do so at their own risk, but be that as it may, how could anybody read Carlen's letter as other than aprotest to the takeover. I mean, certainly he is not saying, "Okay, be our guest. Go ahead with the takeover and we are not upset about this." He writes on June 17, and Mr. Sinsheimer is a lawyer, I mean we didn't have to spell it out for him, "I have discussed this action with the board of directors and two of these shareholders and they are greatly distressed. They believe the progress of ISL through May of 1970 clearly indicated that the profit goal set for the company under the agreement of February 2, asamended, would be met. In our negotiations you repeatedly indicated that no such action would be taken as long as progress was being made by ISL. have now seen fit to assume management despite your contrary assurances."

And, then, how can it be stated any plainer:

"The directors will look to Plessey, Inc. as

trustee of the rights of Scientific Holding Co. under the

Pebruary 2 agreement. The directors know and will

expect that the good faith management of ISL by Plessey,

Inc. will entail the production of the maximum profit

available during the 12 months' period ending March 31,

1971. To this end the directors have confidence and will expect that you will make available to them complete monthly accounting of all ISL activities, sales, expenses and such other information as may be necessary or desirable for them to determine whether in their opinion any course of action or expense is detrimental to attaining the profit goal."

How can you state it any plainer than that?

Mr. Sinsheimer, a lawyer, wasn't on notice with that letter that we considered the takeover premature and in breach of the contract?

I don't know how you can say it.

MR. MALONEY: You can just say it, that you took over one month early.

THE COURT: Never mind that.

MR. McCONNELL: I think that is all that needs to be said.

Thank you very much.

THE COURT: All right, ladies and gentlemen, there you have it and we will recess now until 10 o'clock tomorrow morning and I will deliver my charge.

Please remember you haven't got the case and please don't discuss it with anyone at all in the meantime.

I hope you have a nice evening. I will see you

op

tomorrow morning.

(Jury left the courtroom.)

THE COURT: Gentlemen, one thing. I plan to send in to the jury I think tomorrow Exhibits 3, 4 and 5, the contracts and the amendments.

Both of you gentlemen referred to exhibits and I don't think you ever mentioned what numbers they were, but it is likely that the jury may be interested in those exhibits and, therefore, I would like each of you to marshal any exhibits that you did refer to in your summations and hold them separately in case the jury wants to see them so we won't have a long digging operation.

Will you do that?

MR. MALONEY: Yes, sir.

THE COURT: All right, thank you, gentlemen.

One other thing: on this proposed list of questions, I think I omitted on the Plessey counterclaims a third question, and that is: if the answers to either 1 or 2 is Yes, did Plessey sustain damage by reason thereof? I think that should be in there to make it balance with the plaintiff's question.

MR. MALONEY: Yes, sir.

THE COURT: I will put that on the second page. All right, gentlemen, see you tomorrow morning. (Adjourned to March 27, 1974, at 10.00 A.M.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

heart-warming to all of us.

U

Also, I want to tell you that I appreciate the sacrifices I know that each of you has been called upon to make in your own personal lives so you could serve in this very important public capacity of being on a petit jury.

I think I told you at the outset a couple of weeks ago that in a sense you and I are partners in the administration of justice. It is my province to instruct you as to the law, which applies to the case, and you must accept my instructions as to the law, but, on the other hand, you, the jury, are the judges of the facts and it is your determination of the facts which is conclusive.

If your recollection of the facts differs in any way from what the lawyers told you yesterday or what I might say to you this morning, disregard what we have said and rely on your own determination and recollection of the facts.

I told you at the outset that during the trial I would be called upon to have conversations with one or the other of the lawyers; indeed, I did. I ruled on objections or other conversations and I told you to pay no attention to all that. They deal with matters of law, housekeeping and other things. I told you just to listen to the witnesses and look at any exhibits that

were received during the trial.

Please draw no inference from anything that I may have said during the trial which might lead you to think that I favor one side or the other in this controversy because, of course, I do not. That is your province; that is not mine.

Yesterday you heard the lawyers summarize the evidence for you. Again, if you find that either of them or both went outside the record, as you recall it, you may disregard what you think was outside of the record.

I told you at the outset that both the plaintiff and defendant here are corporations and you remember I told you that they are entitled to just the same kind of fair and impartial treatment as though they were individuals. Justiceat them just as fairly as you would expect to be treated yourselves.

I thought it might help you, because of the length of the trial, if I first reviewed with you the witnesses who testified before you. Perhaps that might help you in your recollection.

You remember when we started off with the plaintiff's case and you remember I am referring to ISL here throughout as the plaintiff, Plessey as the defendant, we heard quite a few witnesses. ISL started off with Mr.

21 22

Kovar, you remember, who testified about these transactions.

Then you heard from Mr. Carlen. You remember the gentleman from Chicago who, I gathered, sort of ran the syndicate that raised the money for the venture.

Then you heard from Julius Lewis. You remember he was the Chicago lawyer who told us of his work on the contract and, as I recall it -- again, as I say, it is your recollection that controls -- as I recall it, he went to Barbados and acted for ISL after the closing.

Then you heard from Harold Shapiro. He was another Chicago lawyer for ISL who told us about various conversations and negotiations with respect to the contract.

He was followed by William Tucker. Do you remember William Tucker? He was, as I recall it, the chief or national sales representative for ISL. He was running the reps, I think as they have been called. He told us about what he did and what had happened.

Then, ISL called Mr. Sinsheimer, do you remember, who, as I recall it, was the president of the American Flessey Company.

And Donald Clarke, who was another Plessey man.

I think he was president of Plessey Electronics.

That was ISL's direct case, those witnesses.

Then, Plessey came along with its case and

THE COURT: I beg your pardon, I forgot Mr.

Vangelakos. The second Magnavox witness was Mr.

Vangelakos, you remember, the Magnavox engineer, who told us about the various tests which had been made of the memory components for the Difar, I think it was called,

23

24

program.

Then he was followed by Richard Gendron, who was the traffic manager for Plessey Electronics. He talked, as I recall it, something about how they changed the customs brokers.

He was followed by Donald Ballantyne. Do you remember he was the Scot. You could tell he was a Scot all right, and he told us that he was an engineer with ISL before and after the Plessey takeover.

Finally, you heard from Milton Albert, you remember, who, as I recall it, was in the financial end of Plessey. I think he said he was a financial vice-president.

Then, ISL came back on rebuttal with Mr. Peter Hewitt. You remember Peter Hewitt was formerly with Plessey and had been with Plessey in Lisbon and was brought over to Barbados.

Then ISL also recalled Mr. Kovar on rebuttal.

How do you evaluate the testimony of all of these witnesses? The stories were conflicting in some respects. You, of course, are the exclusive judges of their credibility.

In evaluating their credibility, ladies and gentlemen, please apply your common sense and experience

just as you do in determining an important matter in your own private lives when you are called upon to decide whether or not you have been given a true picture of a given situation.

I think you might consider the witnesses'
demeanor, you would consider his background, you would
consider his candor, his means of information, the accuracy
of his recollection, and you consider whether you find a
witness's testimony is supported or whether you think it is
contradicted by other credible testimony or circumstances.

You consider whether a witness has an interest in the case. Now, some of these witnesses have an interest in the case. For example, Mr. Kovar has an interest in the case. He was the president of ISL.

Mr. Tucker, who, I think, said he was a shareholder in ISL.

Then, there were a number of Plessey people who testified. For example, you had Mr. Sinsheimer, Mr. Clarke and Mr. Gretton. They have an interest, of course.

That is a factor that you should consider.

This doesn't mean that any witness will mislead you or

falsify because he has an interest, but his interest is a

matter that you should consider in determining his credibil
ity.

If you think that any of these witnesses misled you and testified falsely, you can disregard all that witness's testimony, if youwant to, or you can accept part of his testimony, if you think it is reliable, and you can disregard the rest of it.

Now, as you will see when I review these questions with you, I have left copies on each of your chairs, ISL ismaking certain claims against Plessey and Plessey is making certain claims against ISL. Now, in the claims that ISL is making against Plessey, ISL has the burden of proof. With respect to the claims that Plessey is making against ISL, Plessey has the burden of proof.

What do we mean by "burden of proof"? It is simply this: that the person making the claim must prove its claim by a fair preponderance of the evidence. This means that you take the evidence which supports the plaintiff and the evidence which supports the other side and weigh the evidence in your mind, determine which has the most convincing force, which you think is the correct version of the facts.

of course, it is the quality of the evidence, not the quantity of the evidence, which is important in determining whether the person making the claim has carried his burden of proof.

op

 Sort of picture in your mind, perhaps, the scales of justice or any old scales, if you want, and put on one side of it the evidence which you think supports the claim of the person making it and, on the other side, the evidence which you think refutes that claim. Weigh it in your minds. The side having the burden of proof must tip those scales ever so slightly, but it must tip them in its favor.

Should these scales remain evenly balanced in your minds or should they tip on the other side, then the person having the burden of proof has not carried his burden and your verdict should be for the other side.

Yesterday the lawyers reviewed with you the evidence in considerable detail. I don't intend to review it all with you again. You have heard it. You have been very attentive, and, as I mentioned to you, it isn't what I say, it is what you, ladies and gentlemen, recall and decide.

I thought it might be helpful to you, however, if I reviewed with you briefly the contentions of the parties.

All of these disputes, ofcourse, arise out of this famous contract which they entered into on February 4, 1970, which was Exhibit 3.

Then, you remember, it was amended on February

18, which is Exhibit 4.

And again on March 2, which is Exhibit 5.

That was a proper amendment on March 2.

Under the contract Plessey acquired the business and the assets of ISL in Barbados subject to the terms of the contract.

Now, ISL is contending here that Plessey breached the contract and in particular paragraph 5-D when it assumed management control on June 9, 1970.

ISL also contends that Plessey breached the contract by failing to continue the business or carry on the business, if you will, of ISL in good faith during the measuring year.

Why is this measuring year so important? You will recall that when the contract was closed in Barbados, Plessey paid ISL \$180,000. That was the down payment?

payment if the business had profits during the measuring year. Thus, the contract provided that if the profits during the measuring year were \$360,000 or more, then at the end of the measuring year Plessey would pay ISL an additional \$1,260,000. This second payment would be reduced proportionately if the profits were less than \$360,000 a year.

2.

ď

.

For example, if they had been \$180,000, then

the second payment would be a half of \$1,260,000.

**b2** 2

\_

Of course, if there were no profits during the measuring year, there would be no second payment.

That is why the issue as to whether Plessey continued the business in good faith during that year is so important.

ISL says that because of these breaches that it contends happened, it was damaged.

Also, ISL contends that when Plessey went into the contract with it, Plessey deceived ISL into believing that ISL would be allowed to operate the business during the measuring year in a manner which would maximize the profits when, in fact, Plessey intended at that time to integrate ISL's business into its overall operations -- you remember the testimony about the matrix plan USA, I think it was called, or something like that -- and intended to take over the management as soon as possible notwithstanding the provisions of 5D of the contract.

Finally, ISL contends that if it had been allowed to remain in control during the measuring year, ISL could have made a substantial profit which, of course, would have resulted in a further payment under the contract

Now, Plessey denies these contentions. Plessey contends that under paragraph 5D it was entitled to assume management control when it did on June 9th because ISL failed to achieve a profit of \$15,000 in May.

As I recall, there was evidence that they had a profit of something like \$6,000, but they didn't have \$15,000.

Plessey also contends that the evidence shows it did operate the business of ISL in good faith and it denies that it deceived ISL in any way and that it took over the business only when ISL failed to make the requisite \$15,000 profit in May and that this was in accordance with the contract.

Plessey also contends that even if it had breached the contract, which of course it denies, that ISL has suffered no damage here at all because the evidence during the trial establishes the ISL management could not have made any profit during the measuring year, even if they had stayed there, and, therefore, would not be entitled to any further payment.

Then, as to the claims of Plessey against ISL, which I referred to the other day as a counterclaim, here Plessey contends that ISL breached the contract because it made certain representations and warranties under paragraph 10 of the contract and that these representations and warranties were false with respect to the condition and value of the inventory and the accounts payable.

eoh 3

•

Plessey points to the evidence that the inventory was substantially less than represented and warranted and that the accounts payable by ISL were substantially more than represented and warranted.

Plessey further contends that ISL intentionally deceived Plessey in these regards knowing that these representations were false for the purpose of inducing Plessey to close the contract on March 2nd.

Here ISL, of course, denies Plessey's contention; denies that there was any breach on its part of the contract and that the evidence fails to show that it deceived Plessey in any way as to the condition of the business.

ISL refers to the evidence as to the visits in Barbados by the Plessey personnel. It contends that Plessey knew all about the business; that any mistakes that might have been made were inadvertent and that Plessey was in no way deceived.

Now, this brief statement of the contentions is not complete and I didn't intend it to be. I did it only, perhaps, to help you with your own recollection.

You will first consider, I told you this yesterday, you will first consider whether either of these parties is liable to the other, reserving for your later determination the question of the amount of damages, if

ISL.

you should find any liability. To assist you in determining whether either party is liable to the other, I prepared with the assistance of the lawyers a series of questions, copies of which you have on your chairs.

Now, you will notice these questions, the first page contains the plaintiff's ISL's, claims against Plessey.

The second page contains Plessey's claims against

With respect to the claims on the first page,
ISL has the burden of proof, as I told you previously.

On Plessey's claims on the second page, Plessey has the burden of proof.

Let's start with the questions on the first page.

"1. Did Plessey breach paragraph 5D of the contract dated February 4, 1970 (Exhibit 3), as amended by the February 18, 1970, letter (Exhibit 4) and on March 2, 1970 (Exhibit 5), by assuming management control on June 9, 1970?"

There are boxes there to say "Yes" or "No".

Mr. Foreman, after you had reviewed these questions with the jury and reached a conclusion, you will enter the "Yes" or "No" in the appropriate boxes and sign the page at the bottom in each case and that will constitute your verdict as to liability.

coh 5

J

22 23

Going back to question 1, this famous paragraph 5D, as finally amended on March 2nd, provided "The present management of ISL," that is Mr. Kovar, of course, and his group, "shall operate the business during the measuring year and shall have the maximum freedom to operate the business in a manner which will produce in the judgment

of such management the maximum profit available provided,

however, that any policy directive issued by the directors

of Plessey shall be complied with."

Then there is a part I am skipping and it goes on to say:

"Notwithstanding the foregoing," and this is the important part, "if the profits of ISL commencing May 1, 1970, crediting to the month of May the net profits of the two month period comprised of March and April, 1970, but not charging any net loss for that period, average less than \$15,000 per month, or if there have been three consecutive months of losses during that measuring year, excluding the first two months thereof, this paragraph shall no longer apply and Plessey shall have the right to assume full management responsibilities.

In such event, however, Plessey shall be obligated to continue the business of ISL during the measuring year in good faith."

l

eoh6

Now both parties and the same

Now, both parties agree that the effect of the final amendment, the March 2nd amendment, was to reduce by one month the period in which ISL had to earn the profits required to retain management control. However, ISL contends that it had the right to remain in charge at least until the end of June.

You recall that the take-over was on June 9th.

While Plessey contends that it could take over
in the beginning of June because the May profits, after

crediting to May any profits for March and April, were
less than \$15,000.

So, there is a difference. The parties just differ on what the language here means.

ISL in support of its contention called Kovar,

Carlen and Lewis. They all testified about this thing. You

remember they discussed the changes that were made from

the previous drafts of the contract. ISL contends that

under the plain and ordinary meaning of the words that I

just read you, which use the word "average", that it must

mean more than one month because you can't average one month's

profits.

Plessey, on the other hand, and they introduced the testimony of Sinsheimer and Dubin, said the reason for the use of the word "average" was to protect ISL from

eoh7

losing management control if after they have had a profitable May, June and July, let's say, they might have had a couple of bad months where they had no profits and this was to protect them so as long as the average was \$15,000 over the months, ISL would remain in control.

Now, since the parties here are in sharp disagreement as to the meaning of this section that I just read you and since the language is ambiguous, it is up to you, ladies and gentlemen, to determine what the parties intended. You heard the witnesses and the facts and circumstances surrounding the making of the contract. You have heard the lawyers' arguments and if, after considering all of the evidence, you conclude that paragraph 5D, which I read to you a minute ago, gave ISL until the end of June to average \$15,000 profits, then you may find that Plessey breached the contract by assuming management control on June 9th and answer "Yes" to the first question.

On the other hand, if you conclude that Plessey here is right in the meaning of "average" and Plessey had the right to assume management control following the end of May because the profits were less than \$15,000 and in that event Plessey didn't breach the contract, then your answer to question 1 would be "No."

Now, so much for the first question. Turning now

2

3

5

6

7

8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

eoh8

to the second question, which reads:

"Did Plessey breach paragraph 5D of the contract dated February 4, 1970 (Exhibit 3), as amended by the February 18, 1970, letter (Exhibit 4) and on March 2, 1970 (Exhibit 5), by failing to continue the business of ISL in good faith during the measuring year (April 1, 1970-March 31, 1971) " which was the measuring year.

I reviewed that with you that there was under the contract the duty on Plessey, if they took over operations, to operate the business in good faith.

Now, ISL here contends that Plessey didn't do that and you remember the evidence which they introduced to the effect that Plessey changed the nature of the ISL business to meet its own program, the matrix plan, and they changed the shop and did a lot of things and they had an office in Boston, discontinued the cable harness electrical assembly work and they say that the purpose of this was to integrate ISL with Plessey, but that the effect of it was to depress the profits which the ISL business could earn and for that reason they claim that Plessey did not operate the business in good faith.

Now, Plessey, of course denies this. It says that all of the actions that it took during the measuring year were for the purpose of seeing if they couldn't earn eoh 9 , 1805

any profits for the business and Plessey contends they discontinued the cable harness and electrical assembly business because the evidence shows it wasn't profitable.

It was taking up space for stringing cores which more likely could have been profitable and that the Boston facility, they thought that was an improvement because it was near the customers, it was better and easier to serve the customers.

Then Plessey points to the fact that during the measuring year it pumped some \$2,000,000 into the business of ISL. You remember here that originally it had to put in \$600,000 and then that was increased to \$800,000 on March 2nd. Plessey contends the evidence shows not only did they do that, but they put in a lot more money during the measuring year and that they operated in good faith, but in the nature of things, on the basis of the testimony you have heard, it would have been impossible for them or anyone to make a profit during the measuring year.

Now, what is meant by "good faith" here as it is used in the contract? All "good faith" means here is that Plessey was required to exercise reasonable efforts, reasonable efforts, that a prudent and reasonable businessman. would exercise to operate ISL on a profitable basis during the measuring year.

Now, Plessey would not be acting in good faith

eoh10

if you found that it took actions which had the effect of reducing the ability of ISL to make profits which otherwise would have existed.

So, consider here: Did Plessey meet the standard of good faith in operating the business? If you find that it did not exercise good faith, as contended by ISL, then your answer to question 2 would be "Yes" because then it would have breached the contract.

On the other hand, if you find that Plessey did exercise good faith in operating the business of ISL, then your answer to question 2 would be "No."

Turning to Question 3:

"Did the plaintiff" -- the "plaintiff" here, of course, is ISL -- "Did ISL sustain damage by reason of these breaches?"

If you found they breached one, or two, if you have answered either one or two "Yes," then you must find did the plaintiff sustain damage because of the breach.

Here you will recall ISL contends on the basis of the testimony of Mr. Kovar and others that if it had been left in control it could have earned profits during the measuring year.

Plessey, on the other hand, contends the evidence shows that under no circumstances could ISL have made a profit during the measuring year.

Now, here you won't concern yourselves with the amount of damages. All you concern yourselves with is whether there was any damage at all to ISL.

If you find that ISL could have made a profit during the measuring year, then you would answer Question 3 "Yes."

On the other hand, if you find they couldn't, then you will answer Question 3 "No."

Then, coming to Question 4, which reads:
"At the time Plessey entered into the contract

with ISL, did Plessey deceive ISL into believing it would be allowed to operate the business of ISL in a manner which would maximize profits, when in fact Plessey intended to integrate ISL's business with its overall operations and to take over management as soon as possible, notwithstanding the provisions of paragraph 5 of the contract?"

when I reviewed the contentions of the parties, I told you here that ISL is contending that Plessey deceived it into believing that it would be allowed to run the business, have an opportunity to maximize the profits, when, in fact, Plessey at the time had no such intention. It just intended to integrate the business with the rest of their business and in accordance with the so-called Matrix U.S.A. Plan and it didn't care whether they made a profit or not as long as they might make a profit somewhere else and that they intended to take over the management as soon as possible notwithstanding the contract.

In other words, ISL here is contending that it was induced to enter into this contract by deception, which in law we refer to as fraud, and that was mentioned during the trial.

Plessey denies ISL's contention, denies any fraud or deception. Plessey contends the evidence

shows that it intended to honor the provisions of the contract and to leave the business in ISL's control so long as it made the profits required by the contract.

Here again review paragraph 5-D of the contract and determine whether you find on all of the evidence that ISL has proven, again proven by a fair preponderance of the evidence, the scales tipping in its favor, even ever so slightly, has proven that Plessey did deceive it into believing that it would be allowed to operate the business of ISL during the measuring year in a manner which would maximize profits.

In doing this consider the following elements, ladies and gentlemen:

- 1. Did Plessey represent to ISL at the time
  ISL entered the contract that subject to the profit requirements ISL would be allowed to operate the business during
  the measuring year in a manner which would maximize profits?
- 2. Was Plessey's representation false because, in fact, when it entered into the contract it intended to integrate Plessey's operations in its overall business and to take over management control as soon as possible notwithstanding the provisions of the contract?
- 3. At the time it made the representation, if it made it, did Plessey know that it was making a false

representation to ISL?

Finally, 4. Did ISL rely on Plessey's representation that it would be allowed to continue the business subject to the contract in entering into the contract?

If going over these four points your answers to them are Plessey made the representation, that it was false, that Plessey knew it was false and that ISL relied on the representation, then your answer to Question 4 will be "Yes."

On the other hand, if your answer to any of these is "No," either that there was no representation or, if it was made, it was not false, or, if it was false, Plessey didn't know it was false at the time or if you find that ISL didn't rely on this in entering into the contract, they entered into it for other reasons, then your answer to Question 4 will be "No."

Finally, the last question:

"If your answer to 4 is 'Yes,' did ISL sustain damage by reason thereof?"

Again, that is somewhat similar to what I went through before. You must find here, if you find there was deception, if you find there was fraud under 4, did that damage ISL? That depends on whether you think under the evidence ISL could have made profits during the measuring

year.

If you find that they could have, you think they could have, you will answer Question 5 "Yes."

If you find that they couldn't have, then you will answer Question 5 "No."

Now, so much for ISL's claims against Plessey.

Now we turn to Plessey's counterclaim or claims against

ISL and as to these I remind you again, here it is Plessey

that has the burden of proof to prove its claims by a fair

preponderance of the evidence, again tipping the scales

in its favor ever so slightly.

The first question here reads:

"Did Plessey rely on the warranties contained in paragraph 10-D and G of the contract (Exhibit 3)?"

Now, in these paragraphs of the contract, ladies and gentlemen of the jury, ISL made certain representations and warranties as to the condition of the business of ISL at the time of the closing on March 2nd and Plessey contends that these representations and warranties were false.

You heard testimony regarding the inventory:

that the inventory was substantially less than ISL represented it to be and that the accounts payable were substantially more than ISL represented them to be.

Plessey contends, also, that it relied on these

representations which ISL made as a result of the accounts which, I guess, Hourihan had prepared, relied on these at the closing.

On the other hand, ISL contends that there is nothing to this at all; that Plessey had sent its people to Barbados, they knew all about ISL, they could look around at the bins where the inventory was and they knew all about it and, indeed, they knew that really ISL was about to go to the wall unless they made a deal, they didn't have enough cash to get along, that Plessey knew all about this and they didn't rely on the so-called representations of Hourihan at all.

So, here again consider the evidence, ladies and gentlemen. If you find that these representations and warranties were made and that Plessey relied on them, you will answer Question 1 "Yes."

If you find that they did not, you will answer Question No. 1 "No."

Turning to Question 2:

"Did ISL breach the warranties contained in paragraph 10-D and G of the contract?"

Of course, this is closely related to Question 1.

Question 1 had to do with whether Plessey relied on them

and Question 2 has to do with whether ISL breached the

Ор

contract by making false representations and warranties.

Here Plessey contends that these representations and warranties were false, again referring to the inventory and the accounts payable, and ISL denies these contentions and says that the evidence shows that any errors here were inadvertent clerical errors. You remember the misplaced decimal point in the inventory, I think, and on the accounts payable that the books were in bad shape, all right, and maybe there were more accounts payable than they stated, but there were a lot they state that were not there. They discovered them not to be there and it was just a case of faulty bookkeeping. Negligent, perhaps, but not misrepresentation.

Again, of course, ISL says that Price, Waterhouse, the auditors, participated in the work and that Plessey knew all about the business and knew all about the condition of the inventory and the accounts.

So, here again consider the evidence and determine whether you find there were any misrepresentations here with respect to the inventory and the accounts payable and if you find there were, then you may find that ISL did breach the contract in which case you would answer "Yes" on Question 2.

But if you find that they didn't, then you would

answer Question 2 with "No."

Then, turning to Question 3:

"If your answer to both 1 and 2 is 'Yes'" -here, remember, you have to have "Yes" on both 1 and 2 -"did Plessey sustain damage by reason thereof?"

This is rather like what I did on the other side. Here Plessey is contending it was damaged because there had been this misrepresentation and it was taking on more than it had bargained for under the contract.

ISL denies this and again says these were purely clerical mistakes and that Plessey knew all about the business.

So, here consider whether you find on all of the evidence whether Plessey sustained damage by reason of the statements made as to the inventory and accounts payable. If you find they did, your answer to Question 3 is "Yes."

If you find they did not, then your answer to Question 3 is "No."

Now, Question 4 is somewhat akin to Question 4 of the ISL claims. This again is a question of fraud.

"Did ISL deceive Plessey by making the representations and warranties in the contract, knowing that these representations and warranties were false with respect to inventory and accounts payable?"

Here, as I understand it, Plessey is contending that ISL did deliberately deceive it here in order to get Plessey to go along and close the contract on March 2 and ISL denies it for the reasons that I have mentioned to you before.

Consider here again, as you did before, does
the evidence establish to you that ISL was deceiving Plessey
here on these matters and consider the same elements I
mentioned to you before, which are, did ISL represent and
warrant to Plessey that the condition of the inventory
and the accounts payable were as indicated on Hourihan's
financial statement?

- 2. Were these representations and warranties false because of the reasons I have reviewed with you?
- 3. Did ISL know at the time that the representations and warranties were false?
- 4. Did Plessey rely on the representations and warranties in closing the contract with ISL?

If you find that Plessey has proven all of these four points by a fair preponderance of the evidence, then your answer to Question 4 will be "Yes."

On the other hand, if you find they have not, then your answer to Question No. 4 will be "No."

Finally, as to Question 5:

"If your answer to 4 is 'Yes,' did Plessey sustain damage by reason thereof?"

Well, here again, if you find that ISL did deceive Plessey here in these matters, did that deception damage Plessey?

Here Plessey contends that it would be getting less assets and more liabilities than it was bargaining for, but ISL denies this on the basis of the evidence and said it all pretty well balanced out. There were a lot of mistakes, but the mistakes pretty well balanced out and Plessey did get what it bargained for, so consider whether you find that Plessey was damaged here in any way.

If you find that it was, you would answer Question 5 "Yes."

5 "No."

have those.

b7 2

••

I am going to send into the jury room the contracts, which are Exhibits 3, 4 and 5, which I have been talking about, so that you will have them in the jury room. I am going to ask the lawyers to send in any exhibits which they referred to in their summations. You remember they

did refer to a number of exhibits in their summations

and I would like them to send those in to you so you will

If you find it was not, you would answer question

of them, if you want any other exhibits, we have got plenty marshal know and they will be made available to you.

When you retire and deliberate, ladies and gentlemen, remember that a jury deliberation is one in which everybody participates. No one holds the floor and everybody joins, in and participates.

Jury deliberation is one in which you express your own views and exchange views. Don't be afraid to change your original view because of pride of opinion or any other reason if after talking to your fellow jurors you become convinced that your original view is wrong.

But, on the other hand, if you have a conscientious conviction about the case, don't give that up, but do listen

eoh2

carefully to your fellow jurors.

Keep in mind that both sides here want this decision to be made by you. Each of them, naturally, hope they will win, but they both want it to be made by you so that while none of you should give in merely because you are outvoted, do listen carefully to your fellow jurors and attempt to facilitate the course of justice by reaching a verdict for one side or the other.

Your verdict here must be unanimous. That is the rule in this court. I mention this to you because some of you may have served on a jury in the state courts where the rule is different.

With that, ladies and gentlemen, I am going to turn the case over to you, at least I will in a minute, and I am sure you are going to consider all of the evidence and that you will render a fair verdict here and that that verdict will be without sympathy and without bias and without prejudice with respect to either of these parties.

As I mentioned to you, the verdict, Mr. Foreman, will be the answers to these questions and your signature on these two sheets.

THE FOREMAN: Just one sheet to be turned in?
THE COURT: Two sheets, just these two.

THE FOREMAN: Everyone doesn't fill out their own?

THE COURT: No, you sign them and the others just have them to follow along, but you render the verdict for the jury.

THE FOREMAN: Yes, sir.

THE COURT: By signing each of these pages at the bottom and putting in the boxes what the vote of the jurors is.

THE FOREMAN: One more question: The alternate juror has no say or vote?

THE COURT: The alternate will not be with you much longer. She will be excused.

THE FOREMAN: That answers that.

THE COURT: Yes.

Come forward a minute, gentlemen.

(At the bench.)

THE COURT: Are there any exceptions?

MR. McCONNELL: The only exception I have, your Honor, is the withdrawal of the issue of the validity of the March 2nd amendment.

THE COURT: You made that already. You have an exception on that.

MR. McCONNELL: The only further exception I would have is that if they find that the take-over was premature and in breach of the contract, that then the duty

1 eoh 1820 on the part of Plessey was to maximize profits. 2 3 THE COURT: I think I covered that. I understand your point. I didn't include your constructive trust. 5 MR. McCONNELL: I understand. 6 THE COURT: All right. 7 MR. MALONEY: Your Honor, I think on the fraudulent intent question, we feel that the burden of proof is clear and convincing evidence on that and not a mere preponderance. 10 I think those were the cases that we cited. 11 THE COURT: I think you are quite right on the 12 state law, but I think that would go both ways. I will 13 tell the jury about that on both questions, yours and theirs. 14 MR. MALONEY: On our contentions I don't think 15 it was clear on the first two questions that they can find 16 that the contract was breached whether it was intentional 17 or not, it is only when they get to the fraud issue that 18 they have to find that Hourihan did it intentionally. 19 THE COURT: I think I made that clear. I tried to. 20 I think I made that clear. 21 Thank you both, gentlemen. I will cover that. 22 (In open court.) 23 THE COURT: The lawyers have asked me to make 24 one addition here, ladies and gentlemen of the jury. 25 Question 4 on both the first and second page, which

eoh

in short let me call the fraud questions, really, I have told you what is meant by fraud here, deception. I think I told you the burden of proof here on the first page, ISL has the burden of proof, and on the second page, Plessey has the burden of proof, but on each of questions 4, in addition to the burden of proving the claim by a fair preponderance of the evidence, the law provides that the party having the burden of proof must prove fraud by clear and convincing evidence -- clear and convincing evidence. There is a heavier burden in proving fraud than in the other questions here.

So, you must be satisfied on both of these questions that the party having the burden of proof has proved that there was clear and convincing evidence that the other party did, in fact, defraud them.

Does that cover your point?

MR. MALONEY: Yes, sir.

THE COURT: All right.

Mrs. Negrin, you have been very good and I am very grateful to you for being with us these days and you can' imagine what a pickle we would have all been in if it had been one of the jurors instead of me that got sick last Friday because we have called on you and you would have had to pitch in. Don't feel that your work here has been

in vain because it hasn't. We needed you very badly, but now that your fellow jurors are here and have heard the charge and are able to go and deliberate, it is my pleasure to excuse you.

I do want to say that you have enjoyed coming to this courthouse, where your husband was for so many years, and there have been more exciting trials around this courthouse than this one, but still I hope you have enjoyed coming down here. We have certainly enjoyed having you here.

THE CLERK: Will you report back to the Central Jury Part, please. Give them this card and they will give you your certificate.

ALTERNATE JUROR NEGRIN: I want to show the Judge my husband. Maybe you know him.

THE COURT: Oh, yes, I knew him. Good luck. I hope I see you again one of these days. Take that down-stairs and they will give you a certificate.

ALTERNATE JUROR NEGRIN: Nice to meet you.

(The alternate juror left the courtroom.)

THE COURT: Would you swear the marshal, please.

THE CLERK: Marshals, please come forward.

(Marshals sworn.)

THE COURT: Ladies and gentlemen, I would like to mention one thing before you go: it is now about 11

o'clock. You have two options for lunch. Either you can go out and have lunch, the marshals will take you out to lunch, if you want to, and the other alternative is if you would rather have lunch in the jury room, they will get some sandwiches for you. So, perhaps your first order of business might be to decide what you want to do and let the marshals know. If you want to have sandwiches brought in and have them in the jury room, let them know as soon as possible because it takes a little time to get them.

With that, thank you very much, and you may proceed with your deliberations.

(The jury retired at 11 A.M. to commence deliberations.)

1

3

5

6

8

9

10

11

13

14

16

15

17

18

19

20

22

23

24

25

## AFTERNOON SESSION

1.55 P.M.

(In open court; jury present.)

THE CLERK: Will the members of the jury please answer present as their names are called.

(Roll called; all jurors present.)

THE CLERK: Mr. Foreman, has the jury reached a verdict?

THE FOREMAN: We have.

THE COURT: Ladies and gentlemen of the jury,
Mr. Mulholland, your foreman, has handed me this verdict,
being the answers to the questions asked this morning,
and, first, with respect to plaintiff's claims, Question 1:
Did Plessey breach paragraph 5-D of the contract as amended
and so forth by assuming management control on June 9,
1970?

The answer to that is "No."

Is that everybody's verdict?

(The jurors nodded in assent.)

THE COURT: The second question: Did Plessey breach paragraph 5-D as amended and so forth by failing to continue the business of ISL in good faith during the measuring year?

The answer is again "No."

And since your answer to the first two questions was "No," you didn't answer the third question.

4. At the time Plessey entered into the contract, did Plessey deceive ISL into believing it would be allowed to operate the buesiness of ISL in a manner which would maximize profits when, in fact, Plessey intended to integrate ISL's business with its overall operations and to take over management as soon as possible notwithstanding the provisions of paragraph 5 of the contract?

Your answer again is "No."

Since your answer is "No," you didn't answer Question 5.

Is that everybody's verdict?

(The jurors nodded in assent.)

THE COURT: All right.

Turning to the second page, with respect to Plessey's counterclaims, Question 1: Did Plessey rely on the warranties contained in paragraph 10-D and G of the contract?

Your answer is "Yes."

Is that correct?

(The jurors nodded in assent.)

THE COURT: 2: Did ISL breach the warranties contained in paragraph 10-D and G of the contract?

Your answer is "No."

You didn't answer Question 3 because you didn't answer 1 and 2 "Yes."

The fourth question: Did ISL deceive Plessey
by making the representations and warranties in the contract knowing that these representations and warranties
were false with respect to inventory and accounts payable?
Your answer to that is "No."

Since your answer was "No," you didn't answer Question 5.

Is that all your verdict?

(The jurors nodded in assent.)

THE COURT: Everybody agrees with that verdict.

All right, thank you.

Well, it has been awfully nice seeing you here the last three weeks and you have been a grand jury, and I want you to know how grateful I am and I am sure counsel are that you listened to all this difficult story and you have thought about it and you have come out with your decision, and that is what the jury system is all about.

I never comment on a jury verdict, because, as

I tried to indicate in my charge, the jury verdict represents
the conscientious feelings and convictions of the group
of representative citizens and, that being the case, I

don't think I have any right to comment on it, and I don't think anybody else does. It is your verdict.

I do think you have done a fine job in staying through this case and arriving at a verdict as you have.

What are the instructions?

THE CLERK: They are discharged.

THE COURT: I think you ought to be discharged, but I want to thank you very much and I would like to come out and shake your hands as you go out.

(Jury discharged.)

mmh 1

THE COURT: All right, gentlemen, are there any motions?

MR. McCONNELL: I am going to make a motion, your Honor, for a judgment, notwithstanding the verdict, and, alternatively, for a new trial on the ground that the jury's verdict here is substantially against the weight of the evidence, the liability issue on contract breach and on the liability issue on fraud.

THE COURT: I think I am going to deny that motion.

I might if I had been a juror, it is possible I might
have agreed with you as far as the breach on the averaging
clause, but I do get the impression, the abiding impression
from the evidence that there wasn't really any damage here.

I think it was a case where to my mind -- and I guess again
with that hundred per cent hindsight we all have -- I
think it was a pretty poor contract for the parties to
enter into. I am not prepared to gainsay the jury. They
heard all of the evidence. I am satisfied they considered
it pretty carefully. I think I will let the verdict stand,
and you have an exception on that.

Have you any motions?

MR. MALCNEY: No, your Honor.

THE COURT: Well, with that I would like to thank

you both. It has been an interesting experience. I'm sorry

1 mmh2

these things happen the way they do; I feel particularly sorry with respect to Mr. Kovar, who has been with us all this time. I am glad to have him with us.

Early in the trial as you remember, I tried to settle this case. I wish I had been successful. You gentlement were too far apart. This is the way it is; this is the way the system operates.

So, with that, thank you very much. Good luck to you.

MR. McCONNELL: Thank you.

MR. MALONEY: Thank you.